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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 179.

CALVIN HOOD, PLAINTIFF IN ERROR,

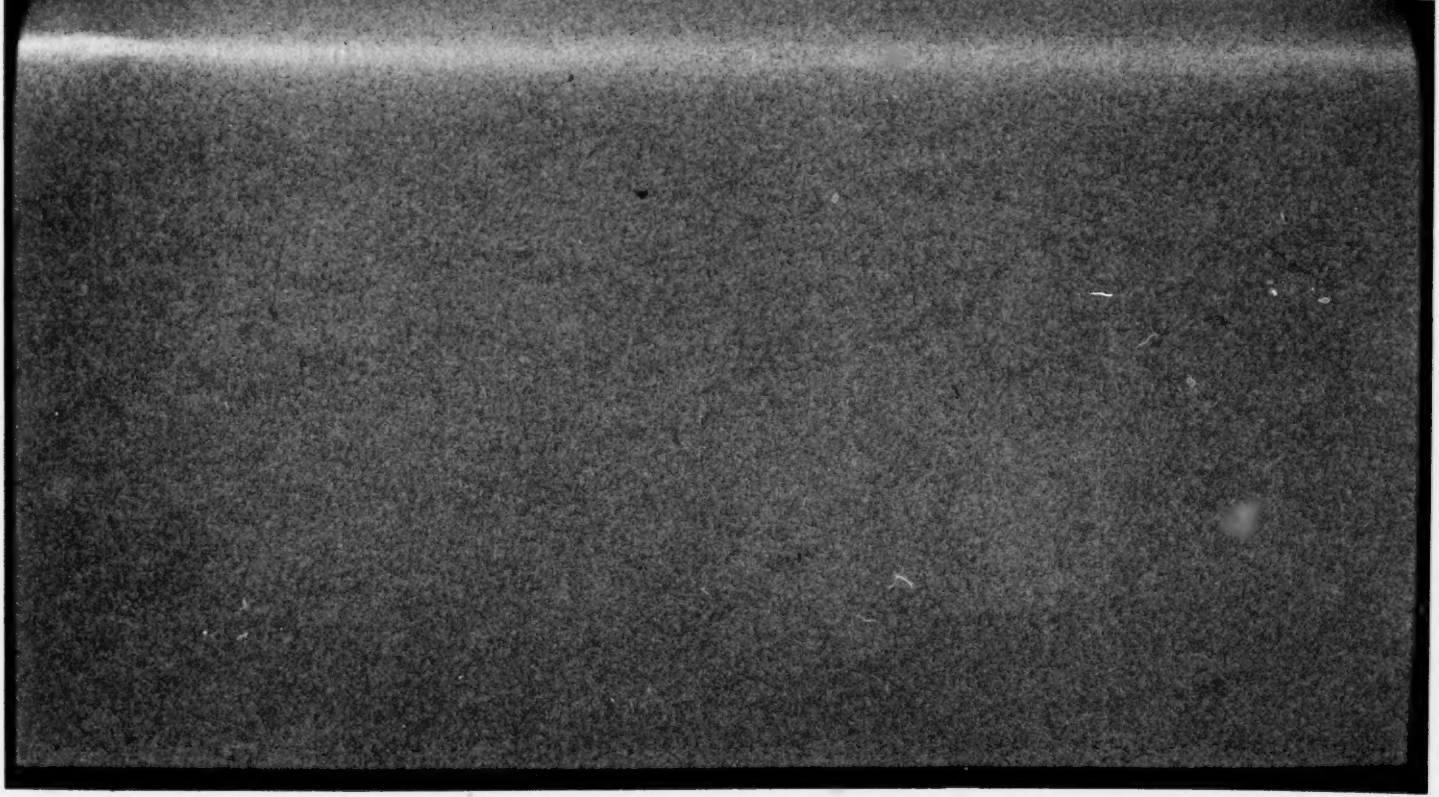
vs.

T. B. WALLACE, AS RECEIVER OF THE MISSOURI NATIONAL BANK OF KANSAS CITY, MISSOURI.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JANUARY 8, 1900.

(17,601.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 2, 1900.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1899, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the first day of May, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twentieth day of February, A. D. 1899, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the district of Kansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in the case of Calvin Hood, plaintiff in error, *vs.* T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri; which said transcript as printed, pursuant to the stipulation of the parties, for the use of the court on the hearing of said cause is in words and figures following, to wit:

1 United States Circuit Court of Appeals, Eighth Circuit.

CALVIN HOOD, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Defendant in Error. } No. 1222.

Stipulation as to Printing Record.

It is hereby stipulated and agreed by and between the parties to this action, that the record printed by the clerk of the court shall consist of the following parts of the transcript, filed February 20th, 1899, and that the clerk of the court in complying with the rules of the court in printing said record is authorized to have said record printed according to the terms of this stipulation.

1. Complaint (page 1).

2. Substituted and amended answer and cross-petition, filed August 15, 1898 (page 48). Said amended and substituted answer shall contain the amendment filed by stipulation of parties, which appears at page 85 of the transcript, as though said amendment had been originally incorporated in and was a part of the substituted and amended answer and cross-petition when it was filed August 15, 1898.

3. Demurrer to substituted and amended answer and cross-petition (page 61).

4. Order sustaining demurrer to the substituted and amended answer (page 83).

4*a*. Stipulation waiving jury (page 84).
5. Judgment (page 87).
5*a*. Petition for writ of error (page 89).
6. Assignment of errors (page 88).
6*a*. Order allowing writ of error (page 90).
6*b*. Bond on writ of error (page 91).
7. Clerk's certificate of transcript (page 93).

C. N. STERRY AND
I. E. LAMBERT,
Att'ys for Pl'ff in Error.
W. C. COCHRAN,
Of Counsel for Def't in Error.

2 No. 1222. Calvin Hood *vs.* T. B. Wallace, receiver, etc. Stipulation as to printing record. Filed Mar. 14, 1899. John D. Jordan, clerk.

United States of America to T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days after the day this citation bears date, pursuant to writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, eastern division, wherein C. Hood is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said C. Hood, plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Amos M. Thayer, judge of the U. S. circuit court, this 24th day of January, A. D. 1899.

AMOS M. THAYER,
Judge of Cir. Court of U. S., 8th Circuit.

Service of the above and foregoing accepted this 2d day of February, 1899.

J. McD. TRIMBLE,
Per C. A. BRALEY.

No. 7543. United States circuit court for the district of Kansas, eastern division. C. Hood, plaintiff in error, *vs.* T. B. Wallace, receiver, etc., defendant in error. Citation. Filed Jan. 24, 1899. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the district of Kansas, first division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit

court, before you, at the November term, 1898, thereof, between T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, as plaintiff, and C. Hood, as defendant, a manifest error hath happened, to the great damage of the said C. Hood, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected,
3 and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 25 day of March, 1899, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of January, in the year of our Lord one thousand eight hundred and ninety-nine. Issued at office in Topeka, Kansas, with the seal of the circuit court of the United States for the judicial district of Kansas (first division), and dated as aforesaid.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas (First Division).

Allowed by—
AMOS M. THAYER,
U. S. Circuit Judge.

January 24th, '99.

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the circuit court of the United States for the district of Kansas, first division.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas, Eastern Division.

No. 7543. United States circuit court for the district of Kansas, eastern division. C. Hood, plaintiff in error, *vs.* T. B. Wallace,
4 receiver, etc., defendant in error. Writ of error. Filed Jan. 24, 1899. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

THEODERIC B. WALLACE, Receiver of the Missouri National Bank of Kansas City, Missouri, Plaintiff,
vs.
CALVIN HOOD, Defendant.

Petition to Enforce Stockholders' Liability.

Plaintiff for cause of action states, that Missouri National Bank of Kansas City is a corporation organized under the act of Congress of the United States of America, relative to national banks.

That heretofore, to wit: on the 3rd day of December, 1896, plaintiff, Theoderic B. Wallace, was by the Comptroller of the Currency of the United States of America, duly appointed receiver of said Missouri National Bank of Kansas City, Missouri, and duly qualified as such receiver, and as such now has charge of all the property, effects and assets of said Missouri National Bank of Kansas City, Missouri.

Plaintiff is a citizen and resident of the State of Missouri, and defendant is a citizen and resident of the State of Kansas, first division.

At the time of the failure of said Missouri National Bank of Kansas City, Missouri, defendant was the owner and holder of one hundred shares of stock of said bank, of the par value of one hundred dollars ($100) per share.

That heretofore, to wit: on the 30th day of July, 1897, it appearing to the satisfaction of James H. Eckels, Comptroller of the Currency of the United States, that in order to pay the debts of said Missouri National Bank of Kansas City, Missouri, it was necessary to enforce the individual liability of the stockholders thereof as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States, said comptroller, by virtue of the authority vested in him by law, did on the said 30th day of July, 1897, make an assessment and requisition upon the shareholders of the said Missouri National Bank of Kansas City, Missouri, for two hundred and fifty thousand dollars ($250,000) to be paid by them ratably on or before the 30th day of August, 1897, and said comptroller did then and there make demand upon each and every one of the stockholders for one hundred dollars ($100) upon each and every share of the capital stock of said association held and owned by them respectively, at the time of the failure of said bank, and said comptroller
5 did order and direct the plaintiff to take all necessary proceedings, by suit or otherwise, to enforce to the extent aforesaid the individual liability of the said shareholders.

Defendant has been duly notified by plaintiff of said assessment, which said assessment, under the order of the Comptroller of the Currency aforesaid, was due and payable at the office of plaintiff on or before August 30th, 1897.

No part of said assessment has been paid, but the same is now due from defendant for which, to wit, ten thousand dollars ($10,000) with interest at the rate of 6 per cent. per annum from August 30th, 1897, and costs, plaintiff prays judgment.

WM. H. WALLACE,
J. McD. TRIMBLE,
Attorneys for Plaintiff.

Indorsed: No. 7543. Theoderic B. Wallace, receiver of Mo. Nt. Bk. of Kansas City, plaintiff, *vs.* Calvin Hood, defendant. Petition to enforce stockholders' liability. Filed Oct. 30, 1897. Geo. F. Sharitt, clerk. W. H. Wallace, J. McD. Trimble, attorneys for plaintiff.

* * * * * * *

In the Circuit Court of the United States for the District of Kansas, First Division.

THEODERIC B. WALLACE, Receiver of the Missouri National Bank of Kansas City, Missouri, Plaintiff,
vs.
CALVIN HOOD, Defendant.

Amended and Substituted Answer.

Comes now the defendant, Calvin Hood, and by leave of court, alleges and shows to the court the following facts constituting his several defenses to the petition of the plaintiff filed herein:

First.

For his first defense to the several matters and things stated and set forth in the plaintiff's petition, defendant says:

That defendant denies that he is now, or ever has been, the owner of the one hundred (100) shares of stock alleged in plaintiff's petition to belong to him, save and except only as hereinafter fully stated and set forth, and not otherwise.

That a short time prior to the 18th day of April, 1896, D. V. Rieger, who was then president of the Missouri National Bank of Kansas City, Missouri, and had been president of said bank since its organization, solicited this defendant and one Charles J.

6 Lantry, of Strong City, Kansas, to purchase some shares of the capital stock of said bank, and to become stockholders in said bank. That after having submitted to this defendant and the said Lantry the proposition to purchase stock in the Missouri national bank, the said D. V. Rieger acting for and on behalf of the bank, and as its president, and through his and its agents, systematically began making efforts and holding out inducements to said defendant and

Lantry, to purchase said stock. It was persistently urged by the said D. V. Rieger, that it was the desire of the Missouri national bank, which he represented, and of which he was president, to have them own stock of the said bank, and their names connected with it, as they were men of means and large business acquaintance in the State of Kansas, and that their connection with the said bank would be of benefit to it because it would attract and secure a large amount of Kansas business otherwise unobtainable. In said preliminary negotiations for the purchase of such stock in said bank the said D. V. Rieger represented that the bank was in a sound, healthy financial condition, free from debts, earning large profits, and paying dividends, and that he was ready and willing to submit to them a detailed statement showing its financial condition. Having become interested in the statements of said D. V. Rieger, and being induced thereby, this defendant, together with said Charles J. Lantry, called upon the said Rieger at the banking-house of the said Missouri national bank, at Kansas City, Missouri, with a view of investigating the condition of the said Missouri national bank, with the intention that if the condition of it was such as it was represented to be by the said D. V. Rieger, of purchasing some shares of its stock.

Defendant further alleges that the said D. V. Rieger, during these preliminary negotiations, was acting as president of the said bank and for the said bank, and during all the subsequent proceedings and negotiations hereinafter referred to in relation to the purchase of stock, and in the subsequent purchase of such stock of the said Missouri national bank by this defendant, he continued to act as president of the said bank, for the said bank, and with the full knowledge and authority of the said bank, and all the statements made by the said Rieger during the negotiations for the purchase of said stock, were made by the said D. V. Rieger as president of the said bank and with the full knowledge, consent and authority of said bank.

Defendant further alleges that immediately after having made said call at the place of business of the said Missouri national bank, he, the said defendant, and the said Charles J. Lantry, informed the said Rieger that they had been induced by his statements to
7 investigate the condition of the bank with the view of purchasing some shares of its capital stock, and they then and there called on said Rieger for a full and complete history and detailed account of the business and financial condition of the said bank. That said Rieger at once promised to submit to them a faithful statement and history of the bank from its organization down to that time, and further agreed to submit such statement to any expert bank examiner that they might select, if they should desire him to do so. This defendant, together with Charles J. Lantry, then proceeded to investigate the condition of said bank and make full inquiries about its history, which said investigation covered the period of several weeks. The said D. V. Rieger represented to this defendant, while making inquiries into the history of said bank and its condition, that it was originally organized with a capital stock of five hundred thousand dollars ($500,000), all of which

had been actually paid for by the subscribers thereto, and the money deposited as required by the banking laws. That some time in July, 1893, on account of the extreme stringency in money matters and panics, the Missouri national bank suspended, but upon a full investigation of the condition of the bank by the Comptroller of the Currency of the United States, and upon a full report of a national bank examiner submitted to the Comptroller of the Currency, the bank was permitted to resume business. That the Comptroller of the Currency required the bank to reduce its capital stock to the extent of two hundred and fifty thousand dollars ($250,000), to cover any loss the bank might have sustained previous to that time. That this left outstanding the sum of two hundred and fifty thousand dollars ($250,000) of the capital stock, all of which had been actually issued to and paid for by the shareholders in said bank at that time.

That the said D. V. Rieger did then and there submit to this defendant a report by the Comptroller of the Currency, dated July 26th, 1893, in support of his statements, which was in words and figures as follows: "This bank (referring to the Missouri National Bank of Kansas City) suspended on the 17th inst., because of a run on the part of its depositors. There was nothing in its condition to warrant this run or occasion suspicion as to its solvency. It seems to have been prudently managed and its resources are unusually free from items of questionable value, there being no bad debts. The bank is solvent and should be permitted to resume." The said D. V. Rieger did then and there submit to this defendant a bulletin issued by the Comptroller of the Currency dated at Washington, D. C., July 28th, 1893, which was in words and figures as follows: "The Missouri National Bank of Kansas City, Missouri, having complied with the conditions imposed by the Comptroller of the

8 Currency, and its capital stock being unimpaired, has this day been permitted to reopen its doors for business. The bank opens with plenty of money on hand, and is wholly solvent and safe." That said D. V. Rieger represented to this defendant that the facts and statements contained in said report and in said bulletin were absolutely true and correct and that the Missouri national bank had been frequently examined after it had resumed business in July, 1893, by national bank examiners and experts, and that they had uniformly and truthfully reported the bank in good, healthy and prosperous condition. That the bank was entirely free from bad loans or unsecured paper; that all the paper held by the bank was fresh, clean paper and well secured, and that the interest on all the securities of said bank had been promptly paid, and that there was not among the assets of the said bank, a single item or piece of paper that had not been secured and kept alive as provided by the banking laws of the United States. A list of the securities and assets of the bank was submitted to this defendant by the said D. V. Rieger and it was represented by the said D. V. Rieger that each and every item on said list was worth its face value and was fully secured. It was further represented to this defendant by the said D. V. Rieger that the said Missouri national bank was, and

had been since its organization, doing a large and profitable business, accumulating a large surplus and paying an annual dividend of six per cent. to the stockholders.

Defendant further alleges that after he had received said statements from the said D. V. Rieger, he secured the services of two expert bank examiners to examine the assets and condition of said bank in defendant's interest and that the said D. V. Rieger made the same statements and representations about the assets and condition of said bank to these two expert bank examiners that he had made to this defendant, and induced them to believe such statements to be true, and to report to this defendant that such statements were true.

Defendant further alleges that, relying upon the representations of the said D. V. Rieger, so made to this defendant by said Rieger in his capacity as president of the said bank, and believing each, all and every of said representations to be true and correct, he agreed to and with the said Rieger as such president of said bank to and he did then and there attempt to purchase one hundred (100) shares of the capital stock of said bank, which the said Rieger represented was the property of said bank, which he represented to this defendant had been theretofore acquired by the bank in a lawful way, and did then and there pay to the said Rieger for said purchase, and as the price thereof, the sum of ten thousand dollars ($10,000) in cash, and received from the said Rieger a certifi-
9 cate of stock dated the 18th day of April, 1896, and numbered 612, and purporting to be issued by the said bank and under its seal as of that date, and that this certificate represented the one hundred (100) shares of stock that the defendant supposed he was purchasing, being the same stock mentioned and described in plaintiff's petition, for this defendant never at any time nor upon any occasion purchased or attempted to purchase any other stock of said bank for himself, and never at any time received for himself any certificate of stock purporting to be a certificate for stock of said bank other than the said certificate numbered 612.

This defendant further says that the said Missouri national bank received the money so paid by him for the purchase of said stock, to wit: the said sum of ten thousand dollars (10,000) and that the same was for the use and benefit of said bank.

And defendant further says that he continued to be the holder of said certificate of stock so issued and delivered to him as aforesaid without the knowledge or means of knowing that the said Missouri national bank was insolvent until on or about the 2nd day of December, 1896. From the time of the delivery of this certificate of stock to him, said bank was apparently doing a very large and prosperous business, having about a daily average of one million five hundred thousand dollars ($1,500,000) deposits, and having apparently on an average in good bills receivable, about one million three hundred thousand dollars (1,300,000); that owing to the vast number of books and the complicated system of book-keeping of this bank, and the artful manner in which its insolvency was and had been secreted by the officers of said bank, no one, defendant alleges, ex-

cept the officers having actual knowledge of the condition of the bank, could or would have supposed from any investigation that could have been made within any reasonable limit of time, that said bank was insolvent, or that any bills receivable were fictitious, fraudulent or dead paper, or that any of the representation- so made to this defendant by said president of said bank were false and untrue, or that it was the purchaser of a large amount of its own stock.

Defendant further shows that on or about December 2nd, 1896, he learned that there were rumors of the insolvency of said bank. That immediately after he had ascertained that there were rumors that the said Missouri national bank was in an embarrassed financial condition, and that there was any question as to its solvency, he began to make the most diligent efforts to ascertain the cause and foundation of said rumors and to ascertain the actual condition of said bank; that during said investigation, which was but a day prior to the suspension of said bank, the president, cashier and other officers of said bank firmly and persistently insisted that the said bank was in a good, healthy financial condition, and was perfectly solvent, as they had represented it to be; that the defendant was unable to ascertain at that time any information showing the real and actual condition of the bank beyond these representations of the officers.

Defendant further says that on December 3rd, 1896, the Comptroller of the Currency of the United States duly appointed the plaintiff as receiver of said Missouri national bank, to take charge of said bank and all of its assets, books, papers and records, and that the plaintiff immediately qualifying under said appointment, took the actual and exclusive control and possession of said bank and all its assets of every kind, nature and description, including all of its books, papers and records, and excluded every one, including the officers of said bank and this defendant, from the right or opportunity to make any inspection of said books, records, papers or assets of the said bank; that although repeatedly requested to give to this defendant and to his associates an opportunity of making a careful and complete investigation of the affairs and condition of said bank, after the same had passed into the possession of the plaintiff as such receiver, the said plaintiff persistently refused and denied such request. That after the said bank was placed in the hands of a receiver by the Comptroller of the Currency, and all the books, papers and documents containing the history of said bank and its business transactions were turned over to the receiver, defendant called upon said receiver, who is plaintiff herein, and demanded of said receiver access to said books, papers and documents of said bank, which said receiver refused; that there was no other source from which he could ascertain the real history of said bank and its business transactions or ascertain its real condition. That he frequently called upon said receiver and asked him for information as to its real history and actual condition, but that the only information he could get from said receiver, who is plaintiff herein, was that the said bank was solvent and under his said management as

such receiver would pay all its debts, liabilities and obligations without making any assessment or call upon the stockholders. That said receiver continued to make said statements that said bank was in a solvent condition, to this defendant and other stockholders and parties interested, up to the time the order of assessment was issued by the Comptroller of the Currency, as alleged in the petition;

11 that by virtue of the statements and representations made by the said receiver, this defendant was led to believe, and did believe, that the said bank was solvent and would pay all its obligations, and that its embarrassments were due to the complication of business matters and would only be temporary.

That said receiver between the time of his said appointment and the order of assessment issued by the Comptroller of the Currency, always maintained not only to this defendant, but to the creditors and stockholders of the bank, that he had full knowledge of the bank's actual condition after having made a most thorough examination, and that the assets of the said bank were sufficient to pay all obligations, liabilities and outstanding indebtedness of the said bank; that said receiver took active steps to prevent an investigation and would always contend with the creditors, stockholders and other parties interested that such steps would not only result in no good, but would tend to embarrass him in the successful settlement of the bank's affairs.

That on or about the 1st day of September, 1897, upon repeated requests, the Comptroller of the Currency of the United States gave to this defendant and his associate, Charles J. Lantry, permission to inspect the assets, books and records of said bank, and to secure all information possible to secure from the same, as to the actual condition of the bank, and also permission to see the reports of the examinations made under the direction of the comptroller and the receiver. That thereupon, for the first time since the appointment of the receiver, the defendant was permitted to, and did make a careful and thorough examination into the actual condition and affairs of the bank.

Defendant further alleges that as a result of such investigation he, for the first time, learned the truth about the actual condition of the bank and its affairs, and for the first time learned that the said representations made by the said D. V. Rieger about the condition of said bank were false, fraudulent and untrue, and that the said D. V. Rieger, when he made such statements, knew that they were false, fraudulent and untrue; that they were made by the said D. V. Rieger while acting as president of the Missouri national bank with a full knowledge of said bank and the directors and the managers thereof that they were false, fraudulent and untrue, and were made for the purpose of inducing this defendant and the said Charles J. Lantry to invest in the capital stock of said bank.

Defendant further alleges that at no time after its organization in 1891 was the Missouri national bank ever solvent or able to meet its debts. That no part of the original capital stock of said bank

12 was ever actually paid for as required by the banking laws of the United States, nor was any part of the reduced capital stock of two hundred and fifty thousand dollars ($250,000)

ever paid for. That said capital stock had in many instances been issued to irresponsible parties and worthless notes taken therefor. That at the time said bank was represented by the said D. V. Rieger to be in good, sound financial condition, the said bank had on hand and included as a part of its good assets, fraudulent, fictitious and worthless paper greatly in excess of its capital stock. That there was at that time, fraudulently concealed and covered up in paper represented to be good, fifty thousand dollars ($50,000) of said D. V. Rieger's personal indebtedness absolutely worthless; that the said bank never, from its organization, earned a dividend, but had paid out in dividends over seventy thousand dollars ($70,000) in order to fraudulently conceal and cover up the actual condition of the bank. That each and every of the representations made by the said Rieger as such president as hereinabove fully set forth and stated, were at the time they and each of them were made, absolutely false and untrue, and were well known to be false and untrue by the said Rieger at the time he made the same.

Defendant further alleges that the said D. V. Rieger, when he made these representations about the condition of the bank, well knew they were false, fraudulent and untrue, and they were made for the purpose of defrauding this defendant and inducing him to purchase the said stock that the said D. V. Rieger well knew to be absolutely worthless, and said D. V. Rieger when he made the representations to this defendant that the bank was solvent and in a good financial condition, well knew that the capital stock had never been properly issued or paid for; he knew that a large portion of said stock was claimed to be owned by said bank and knew that the bank had on hand notes and paper that were fraudulent, fictitious and worthless in a greater amount than the entire capital stock of the said bank, and knew the said bank had never earned a dividend, and knew that the said bank was and had been for a long time prior thereto hopelessly insolvent, but represented to this defendant that the bank was in a good condition as hereinbefore stated, in order to induce him to purchase the one hundred (100) shares of the capital stock of the said bank and defraud him of the said ten thousand dollars ($10,000).

Defendant further alleges that he was induced by the said statements made by the said D. V. Rieger concerning the condition of said bank, and that the bank was in good condition, to purchase said stock; that at the time of the purchase he believed said statements to be absolutely true in every particular and was governed by them and such belief.

13 Defendant further alleges and charges the fact to be that the stock so attempted to be purchased by him from said bank, and for which said certificate above referred to was issued to him, was not at the time of its attempted purchase, nor has it ever been from that time since, of any value whatever.

Defendant further says that by reason of the facts hereinabove stated and set forth, there was no consideration ever received from the said bank for the payment of the said sum of ten thousand

dollars ($10,000) to it at the time of the attempted purchase of said stock.

Defendant further alleges that immediately after he had obtained the information which he did obtain, upon full investigation under the permission of the Comptroller of the Currency as aforesaid, and on or about the 27th day of October, 1897, he called at the banking-house, the prior place of business of the said The Missouri national bank, being at the time the place where all the books, records and papers of said bank were situated and kept, and where the affairs of the bank were being adjusted by such receiver, and that at that time, finding only the receiver in possession and custody of said bank, its assets, books, records and affairs, and being unable to find any officer of said bank, defendant tendered to the plaintiff as such receiver, the said certificate of stock numbered 612, above referred to, for cancellation, notifying and informing said receiver that, owing to the fraud and deceit that had been practiced upon him by which he was induced to purchase or attempt to purchase the stock represented by said certificate, that he disaffirmed the contract of purchase or pretended purchase of such stock and demanded that the said receiver should receive the certificate and cancel it and repay this defendant the sum of ten thousand dollars ($10,000) so paid by him as aforesaid, or such proportionate part thereof as he would be entitled to receive as a creditor of said bank for that amount, all of which said tender and demand made upon the said receiver, the said receiver at that time and ever since then has continually refused to accept or accede to.

Defendant further charges the fact to be that, from the time the bank went into the hands of a receiver until the present time there has not been any officer of the said Missouri national bank living or residing within the State of Missouri upon whom any service of summons or other process could be had in any suit that might be commenced against the said Missouri national bank in the jurisdiction of the State of Missouri or any court therein, save and except only as the plaintiff, as such receiver, might represent said bank, and that since December 3rd, 1896, the said Missouri na-
14 tional bank has had no usual place or no place of business whatever in the territory of the State of Missouri where process of summons against said bank could be left or served upon any person operating such place of business for and on behalf of the bank, save and except as process might be served upon the plaintiff as such receiver.

Second.

And for a second and further defense to the petition of the plaintiff filed herein, defendant says: That by reference thereto he hereby expressly makes each and all the facts hereinabove set forth and stated in the first defense, a part of this, his second defense, and in addition thereto, alleges and sets forth the following further facts:

That prior to and during the negotiations with this defendant and said Charles J. Lantry, the president, cashier and other officers of

said bank, knowing well the actual condition of said bank and knowing the said bank was insolvent, purchased or pretended to purchase from the stockholders or alleged stockholders of the said bank, with the funds of the bank, shares of the outstanding capital stock of the bank in order to prevent exposure by the stockholders owning such shares of the actual condition of the bank and the threatened throwing of such shares on the market at prices which would advertise the insolvency of the bank to the public. That in order to prevent an open and apparent violation of law, and to deceive the public and the Comptroller of the Currency of the United States and his assistants and employés, the officers of the Missouri national bank engaged in the aforesaid transaction and transactions of buying and purchasing or attempting to buy and purchase such shares of its own stock so outstanding, would cause the certificates of such stock so purchased or pretended to be purchased, from the parties holding the same, to be endorsed by the parties to whom the certificates were issued, either in blank or in the names of the president, cashier or some one of the clerks or other parties connected with the said bank, and would then procure a delivery of such certificate so endorsed, pay for the same with money belonging to the bank or by surrendering notes held by the bank against such parties for such stock, or by payment of money and surrender of notes, and that then to account for the funds so used, the parties to whom said certificates would be assigned, or whom the bank pretended were the owners of such certificates, would make a promissory note or notes to the bank for the amount of money used in the purchase of such stock, such note or notes being payable to the bank, and unsecured except in so far as these certificates of stock were issued to secure the same; that all stock purchased or attempted to be purchased by the officers of the bank were paid for out of the funds of the bank and notes taken from these officers, agents and servants of the bank to the bank, to represent the funds so used. That each and every one of the persons engaged in this transaction and who executed any or all of these notes, was at the time, and ever since has been, absolutely, utterly and hopelessly insolvent to the full knowledge of every officer of the bank engaged in these transactions, at the time of the transactions. That such pretended and attempted purchase of each of said shares of stock was made by the bank directly with the owners or holders of such stock, or with the people in whose name such stock stood, to the knowledge of each one of the persons owning or holding said stock, or in whose name it stood, and that none of the transactions concerning the negotiations for the pretended purchase of such stock was made to or with the owners, holders, or the persons in whose name it stood, by any employees in whose name the certificates were taken or to whom the certificates were delivered in blank, save and except in the case of the president and cashier, who in such negotiations and pretended purchases were, to the knowledge of the people they were dealing with, acting for and on account of and in the name of the bank.

Defendant further alleges that in some instances, and perhaps all, the certificates of stock surrendered to the bank were cancelled and new certificates issued to these irresponsible parties who were to hold the same for the use and benefit of the bank; that owing to the fact that the entire history of these transactions so far as it appears in writing, was and is contained in the books, records and papers of the Missouri national bank in the absolute and sole custody of the plaintiff in this case, *and* therefore the defendant is unable at the present time to give a more detailed statement and history of this transaction or to state from whom all these purchases were made or to whom these certificates were assigned, or by whom held, or to whom they may have been transferred. That none of said stock was taken or purchased or procured by the bank to prevent any losses or loss upon any debt or debts previously contracted in good faith, or purchased in any way authorized by law, but the same was purchased by the bank with its funds for the purpose of preventing such stock from being sold in open market and to prevent any investigation being made as to the actual condition of the bank by the parties owning the same. That said stock so purchased would be cancelled and new certificates be issued therefor in the name of the ostensible or pretended purchaser, and all of said stock purchases were made with the funds of the bank and to the depletion of the capital stock of said bank to the extent of said
16 purchases and in violation of law. That none of said parties to whom new certificates of stock were issued ever paid anything for said stock, nor did said parties ever pay or cause to be paid the notes executed to the bank, nor did they intend to pay said notes when they were executed, because they were executed for the fraudulent purpose of concealing the said stock purchased by the bank.

Defendant further alleges that at the time of the negotiations for the purchase of said stock, and at the purchase thereof, that the said bank had purchased with the funds of the said bank in the manner above set forth, about eighty thousand dollars ($80,000) of the two hundred and fifty thousand dollars ($250,000) of the reduced capital stock of said bank.

That during said negotiations with the president and other officers of said bank, by this defendant and said Charles J. Lantry, and at the time of the purchase of said stock as hereinafter set forth, the said president and other officers of said bank represented to this defendant and to the said Charles J. Lantry, who were investigating the condition of said bank, that all of the capital stock of said bank had been subscribed for and issued to *bona fide* and actual purchasers in good faith, and was then held and owned by such parties as stockholders of said bank except an amount of said capital stock which said bank then had on hand, which had been taken in by the said bank to prevent a loss on indebtedness which had been previously contracted in good faith, and which had been taken in by the bank without violating the banking laws of the United States. That said defendant believing said statements, did then and there purchase of the bank one hundred (100) shares of the capital stock of said bank of the par

value of ten thousand dollars, for which he then and there paid the said bank the sum of ten thousand dollars ($10,000), and a certificate was issued to the said defendant by the said bank and which is numbered 612 as aforesaid.

Defendant alleges that at the time of the said purchase or attempted purchase by him of the said stock of the said bank, for which said certificate was issued, the president and other officers of the bank, in order to have the books of the bank show correctly the amount of outstanding stock, caused some or all of said parties who held the certificates of stock in their names, which had been purchased for, by and on account of the bank, to surrender enough of such certificates for cancellation to the bank, so that the certificate which was issued to this defendant could be issued therefor and in the place thereof, and that immediately upon the surrender of such certificates by such parties to the officers of the bank, and without the

17 knowledge of this defendant, said certificates were cancelled by the bank and to an amount sufficient to enable it to issue the certificate so received by the defendant, which was immediately thereafter issued to the defendant. That said parties who held said stock never at any time received the purchase-money paid by this defendant for said stock, but the same was retained and kept by the bank. That, for the reason of all the books, papers and accounts of said bank being now in the hands of the receiver of said bank, the plaintiff herein, and this defendant not having access to the same, he is unable to set forth in detail the names of the persons so surrendering their stock, and amounts held by each one respectively, but alleges that all of said stock purchased by this defendant and the said Charles J. Lantry was a part of the said stock so fraudulently purchased or attempted to be purchased and held, as hereinbefore set forth, by said bank.

Wherefore, defendant demands that this action be dismissed and that the defendant recover from the plaintiff the costs of this action.

C. N. STERRY,
ISAAC LAMBERT,
EUGENE HAGAN,
Attorneys for Defendant, C. Hood.

Cross-petition.

Comes now the defendant, C. Hood, and for his counter-claim against the plaintiff, Theodoric B. Wallace, as receiver of the Missouri National Bank of Kansas City, alleges and shows to the court the following facts, to wit:

The defendant, C. Hood, by reference thereto, hereby expressly makes and incorporates into this, his cross-petition and counter-claim, each, all and every of the facts alleged in his first and second defense in his answer hereinabove set forth contained.

Defendant further alleges and shows that, by reason of the facts stated and the fraud and deceit practiced upon him by the said Mis-

souri National Bank of Kansas City, Missouri, and its officers, he, the said defendant, has been injured to his damage in the sum of ten thousand dollars ($10,000) with interest thereon from the 18th day of April, 1896. Defendant further alleges that he has presented such claim to the plaintiff herein as such receiver, for allowance as a claim against said bank, and that the same has been rejected and refused by the plaintiff as such receiver.

Wherefore *plaintiff* prays judgment against the said Theoderic B. Wallace, as receiver of the Missouri National Bank of
18 Kansas City, Missouri, upon the facts stated in this his counter-claim and cross-petition for the sum of ten thousand dollars ($10,000) with interest thereon from the 18th day of April, 1896, and prays that said judgment may be ordered to be paid ratably by said receiver out of the assets and funds of said bank in his control and possession.

C. N. STERRY,
EUGENE HAGAN,
ISAAC LAMBERT,
Attorneys for Defendant, C. Hood, in His Counter-claim and Cross-petition.

Indorsed: No. 7543. In the circuit court of the U. S. for the district of Kansas, first division. Theoderic B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, plaintiff, *vs.* Calvin Hood, defendant. Amended and substituted answer. Filed Aug. 15, 1898. Geo. F. Sharitt, clerk.

* * * * * * *

United States Circuit Court for the District of Kansas.

THEODORIC B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, Missouri, Plaintiff,
vs.
CALVIN S. HOOD, Defendant. } No. —.

Demurrer to Defenses and Cross-petition.

I.

Now comes plaintiff and demurs to that part of defendant's "amended and substituted answer" which is headed "first" and purports to be his "first defense" to the petition herein, and for cause shows:

I. That this is an action at law to enforce the statutory liability of defendant as a stockholder in the Missouri national bank, for the benefit of creditors of said bank, and said "first defense," if it constitutes any defense at all, is an equitable defense and cannot lawfully be set up in this case.

II. That said "first defense" is based upon alleged frauds, which were not committed by plaintiff or the creditors for whose benefit this action is brought, but were, as alleged, committed by the Missouri national bank, which is therefore a necessary party to the

issues tendered by said defense, but is not a necessary or proper party to the original action.

III. That said "first defense" does not state facts sufficient to constitute a defense to the plaintiff's cause of action stated in the petition, or to entitle defendant to any relief as against plaintiff.

19

II.

Plaintiff also demurs to that part of defendant's "amended and substituted answer" which is headed "second," and purports to be a "second and further defense" to the petition herein, and for cause shows:

I. That this is an action at law to enforce the statutory liability of defendant as a stockholder in the Missouri national bank, for the benefit of creditors of said bank, and said "second and further defense," if it constitutes any defense at all, is an equitable defense and cannot lawfully be set up in this case.

II. That said "second and further defense" is based upon alleged frauds, which were not committed by plaintiff or the creditors for whose benefit this action is brought, but were, as alleged, committed by the Missouri national bank, which is therefore a necessary party to the issues tendered by said defense, but is not a necessary or proper party to the original action.

III. That said "second and further defense" does not state facts sufficient to constitute a defense to the plaintiff's cause of action stated in the petition, or to entitle defendant to any relief as against plaintiff.

III.

Plaintiff also demurs to that part of defendant's "amended and substituted answer" which is headed "cross-petition," and for cause shows:

I. That the said "cross-petition," if it constitutes a defense or counter-claim at all, is an equitable defense or counter-claim which cannot lawfully be set up in this case, which is an action at law.

II. That said "cross-petition" is based upon alleged frauds, which were not committed by plaintiff or the creditors whom he represents in bringing this action, but were, as alleged, committed by the Missouri national bank, which is not a party to this action, and an offset or counter-claim against the bank itself cannot properly be set up by the stockholder in an action brought by the receiver to enforce the statutory liability of the stockholder.

III. That said "cross-petition" does not state facts sufficient to constitute a defense to plaintiff's cause of action as stated in his petition.

20 IV. That said "cross-petition" does not state facts sufficient to constitute a counter-claim in favor of defendant and

against plaintiff, or to entitle defendant to any relief as against plaintiff.

WILLIAM C. COCHRAN AND
J. McD. TRIMBLE,
Attorneys for Plaintiff.

Indorsed: No. 7543. United States circuit court for the district of Kansas. Theodoric B. Wallace, as receiver, etc., pl'ff, *vs.* Calvin S. Hood, def't. Demurrer to defenses and cross-petition. Filed Aug. 15, 1898. Geo. F. Sharitt, clerk. William C. Cochran and J. McD. Trimble, att'ys for plaintiff.

* * * * * * *

UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

At a term of the circuit court of the United States of America, for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 6th day of June, 1898, proceedings were had, and appear of record in words and figures as follows, to wit:

WEDNESDAY, *September* 21*st*, 1898.

THEODORIC B. WALLACE, Receiver, Plaintiff,
vs.
CALVIN HOOD, Defendant. } 7543.

Now on this 21st day of September, 1898, this case coming on for hearing upon the demurrer of plaintiff to the answer and cross-bill of the defendant and plaintiff's motion to strike out said answer and cross-bill, counsel being fully heard, and the court being advised in the premises doth sustain said demurrer, to which order of the court the defendant duly excepted at the time, and by leave of court counsel for plaintiff withdrew their motion to strike out said answer and cross-bill.

Wherefore it is by the court considered, ordered, adjudged and decreed that defendant's answer and cross-bill be and the same is hereby adjudged insufficient; to which order of the court the defendant duly excepted at the time and defendant is allowed ten days in which to file amended answer.

21 In the Circuit Court of the United States for the District of Kansas, Eastern Division.

T. B. WALLACE, Receiver, etc., Plaintiff,
vs.
C. HOOD, Defendant. } No. 7543.

Stipulation for Waiver of Jury.

Now comes the plaintiff by his attorneys William C. Cockran and C. A. Braley, and comes the defendant by his attorney of record,

Eugene Hagan, and by agreement of the parties a jury and a jury trial is hereby waived herein.

T. B. WALLACE,
By W. C. COCHRAN,
W. H. WALLACE,
J. McD. TRIMBLE, AND
C. A. BRALEY,
His Attorneys.

C. HOOD,
By C. N. STERRY,
EUGENE HAGAN, AND
ISAAC LAMBERT,
His Attorneys.

Indorsed: No. 7543. T. B. Wallace, receiver, etc., plaintiff, *vs.* C. Hood, defendant. Stipulation for waiver of jury and jury trial. Filed Dec. 15th, 1898. Geo. F. Sharitt, clerk.

* * * * * * *

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

At a term of the circuit court of the United States of America, for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday the 28th day of November, proceedings were had, and appear of record in words and figures as follows, to wit:

THURSDAY, *December* 15, 1898.

Present: Hon. John A. Riner, judge.

T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Plaintiff,
vs.
CALVIN HOOD, Defendant. } 7543.

This cause came on to — heard upon the petition and the evidence, the defendant being in default for an amended answer or demurrer, and was tried on submission to the court, the rights to a jury and jury trial having been waived by both parties; upon consideration whereof the court finds that the allegations of the petition are true and that the plaintiff is entitled to recover of the defendant, Calvin Hood, the sum of ten thousand dollars ($10,000) with interest thereon from the 30th day of August, 1897, at the rate of six per cent. per annum.

22 It is therefore considered and adjudged that the plaintiff recover of the said defendant, Calvin Hood, the sum of ten thousand seven hundred and seventy-five dollars ($10,775) together with interest thereon from this fifteenth day of December, 1898, and his costs herein expended taxed at $— to which finding and judgment defendant by his counsel excepts and on motion of defendant, execution is stayed for forty days, and sixty days from

this date is allowed within which to prepare and present a bill of exceptions.

In the Circuit Court of the United States for the District of Kansas, Eastern Division.

T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Plaintiff,
vs.
C. HOOD, Defendant. } No. 7543.

Assignment of Errors.

The defendant in this action, C. Hood, in connection with his petition for a writ of error herein, makes the following assignment of errors, which he avers occurred upon the trial of the cause, to wit:

1st. That the court erred in sustaining the demurrer of the plaintiff, T. B. Wallace, as receiver, to the first defense contained in the amended and substituted answer of defendant herein, C. Hood.

2nd. That said court erred in sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the second defense stated and set forth in the amended and substituted answer of defendant herein, C. Hood.

3rd. That said court erred in rendering a judgment in favor of plaintiff, T. B. Wallace, as such receiver, against the defendant, C. Hood, upon the sustaining of said demurrer to the defenses contained in said amended and substituted answer of defendant, C. Hood.

Wherefore the defendant, C. Hood, prays that the judgment of said court heretofore rendered against him be set aside and held for naught, and that he be restored to all things which he has lost by the occasion of said judgment.

EUGENE HAGAN,
C. N. STERRY, AND
I. E. LAMBERT,
Attorneys for Defendant.

Indorsed: No. 7543. United States circuit court for the district of Kansas, eastern division. T. B. Wallace, as receiver, etc., plaintiff, *vs.* C. Hood, defendant. Assignment of errors. Filed Jan. 24, 1899. Geo. F. Sharitt, clerk.

23 In the Circuit Court of the United States for the District of Kansas, Eastern Division.

T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Plaintiff,
vs.
C. HOOD, Defendant. } No. 7543.

Petition for Writ of Error.

Comes now C. Hood, the defendant above named, by C. N. Sterry, his attorney, and complains that in the record and proceedings, and also in the rendition of the judgment in the suit wherein T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, is plaintiff, and your petitioner, C. Hood, is defendant, tried in the circuit court of the United States for the district of Kansas, eastern division, and in which a judgment was rendered against your petitioner, C. Hood, as defendant, on Thursday the 15th day of December, 1898, at the November, 1898, term of said court for the sum of $10,775 damages, and the costs of the action at $46.30, manifest error has intervened to the great damage of your petitioner, C. Hood.

Wherefore the said C. Hood prays for the allowance of a writ of error and such other process as may cause the errors (*maintained*) in the rendition of such judgment to be corrected by the United States circuit court of appeals for the eighth circuit, and for a reversal of said judgment for such errors by said United States circuit court of appeals for the eighth circuit.

EUGENE HAGAN,
C. N. STERRY, AND
I. E. LAMBERT,
Attorneys for Defendant, C. Hood.

Order Allowing Writ of Error.

A writ of error is allowed, as herein prayed for.
Dated Jan'y 24th, 1899.

AMOS M. THAYER,
Circuit Judge.

Indorsed: No. 7543. Circuit court of United States for the district of Kansas, eastern division. T. B. Wallace, as receiver, etc., plaintiff, *vs.* C. Hood, defendant. Petition for writ of error. Filed Jan. 24, 1899. Geo. F. Sharitt, clerk.

Know all men by these presents, that we, C. Hood, as principal and W. T. Soden and G. W. Newman as sureties, are held and firmly bound unto T. B. Wallace, as receiver of the Missouri National
24 Bank of Kansas City, in the State of Missouri, in the full and just sum of twenty-five thousand ($25,000.00) dollars to be

paid to the said T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals this 23rd day of Jan'y, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at the November term, 1898, of the circuit court of the United States for the district of Kansas, eastern division, in a suit depending in said court between T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, plaintiff, and C. Hood, defendant, judgment was rendered against the said C. Hood, and the said C. Hood *has* obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such, that if the said C. Hood shall prosecute said writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

C. HOOD. [SEAL.]
W. T. SODEN. [SEAL.]
G. W. NEWMAN. [SEAL.]

Sealed and delivered in the presence of—
—— ——.

Approved by—
AMOS M. THAYER,
U. S. Cir. Judge.

Jan'y 24th, 1899.

STATE OF KANSAS, } ss:
County of Lyon, }

W. T. Soden, being first duly sworn, deposes and says that he is one of the sureties above named; that he has read the above and foregoing obligation, and that he is worth the sum of twenty-five thousand dollars, above all liability and exemption.

W. T. SODEN.

Subscribed and sworn to before me this 23rd day of January, A. D. 1899.

[SEAL.] ALF. B. ROBERTS,
Notary Public in and for the County of Lyon, State of Kansas.

My notarial commission expires May 1, 1900.

25 STATE OF KANSAS, } ss:
County of Lyon, }

G. W. Newman, being first duly sworn, deposes and says that he is one of the sureties above named; that he has read the above and foregoing obligation, and that he is worth the sum of twenty-five thousand dollars, above all liability and exemption.

G. W. NEWMAN.

Subscribed and sworn to before me this 23rd day of January, A. D. 1899.

[SEAL.] ALF. B. ROBERTS,
Notary Public in and for the County of Lyon, State of Kansas.

My notarial commission expires May 1, 1900.

Indorsed: No. 7543. United States circuit court for the district of Kansas, eastern division. C. Hood, plaintiff in error, *vs.* T. B. Wallace, receiver, etc., defendant in error. Supersedeas bond for costs. Filed Jan. [illegible] 1899. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America, for the district of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in the case of Theoderic B. Wallace, receiver of the Missouri national bank, *vs.* Calvin Hood, defendant, No. 7543. I further certify that the original citation and writ of error are attached hereto and returned herewith.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 26th day of January, A. D. 1899.

GEO. F. SHARITT, *Clerk.*

[Cancelled 10c. revenue stamp.]

Filed Feb. 20, 1899. JOHN D. JORDAN, *Clerk.*

26 In the Circuit Court of the United States for the Eighth Circuit, May, 1899, Term.

C. J. LANTRY, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, State of Missouri, Defendant in Error. } No. 1221.

C. HOOD, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, State of Missouri, Defendant in Error. } No. 1222.

Stipulation.

It is hereby stipulated and agreed by and between the parties to each of the above-entitled causes, that the plaintiff in error in each of said causes may amend his assignment of errors in the record therein, by adding as a fourth assignment in error, an assignment in error as follows, to wit:

4th. That said court erred in sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the cross-petition in the answer in said cause contained.

In briefing these causes, this amendment may be considered as one of the errors assigned and to be briefed.

C. N. STERRY,
EUGENE HAGAN,
Attorneys for Plaintiff in Error.
WILLIAM C. COCHRAN,
Attorney for Defendant in Error.

1222. Calvin Hood, plaintiff in error, *vs.* T. B. Wallace, as receiver, etc. Stipulation to amend record. Filed Apr. 29, 1899. John D. Jordan, clerk.

27 (*Appearance of Counsel for Plaintiff in Error.*)

And on the twentieth day of February, A. D. 1899, there was filed in the clerk's office of said circuit court of appeals an appearance of counsel for plaintiff in error in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

C. HOOD, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver, &c. } No. 1222.

The clerk will enter my appearance as counsel for the plaintiff in error.

C. N. STERRY AND
ISAAC LAMBERT,
Att'ys for Pl'ff in Error.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1222. C. Hood, plaintiff in error, *vs.* T. B. Wallace, as receiver, &c. Appearance. Filed Feb. 20, 1899. John D. Jordan, clerk. C. N. Sterry, Isaac Lambert, counsel for pl'ff in error.

(*Appearance of Counsel for Defendant in Error.*)

And on the twenty-sixth day of April, A. D. 1899, an appearance of Mr. William C. Cochran, as counsel for the defendant in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

CALVIN HOOD, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver, &c. } No. 1222.

The clerk will enter my appearance as counsel for the defendant in error.

WILLIAM C. COCHRAN.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1222. Calvin Hood, plaintiff in error, *vs.* T. B. Wallace, as receiver, &c. Appearance. Filed Apr. 26, 1899. John D. Jordan, clerk. William C. Cochran, counsel for def't in error.

28 (*Appearance of Counsel for Defendant in Error.*)

And on the eleventh day of May, A. D. 1899, an appearance of counsel for the defendant in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

CALVIN HOOD, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver, &c. } No. 1222.

The clerk will enter my appearance as counsel for the defendant in error.

J. McD. TRIMBLE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1222. Calvin Hood, plaintiff in error, *vs.* T. B. Wallace, as receiver, &c. Appearance. Filed May 11, 1899. John D. Jordan, clerk. J. McD. Trimble, counsel for def't in error.

(*Order of Submission.*)

And on the twenty-fifth day of May, A. D. 1899, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

THURSDAY, *May* 25, 1899.

CALVIN HOOD, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank. } No. 1222.

In error to the circuit court of the United States for the district of Kansas.

This cause having been called in its regular order, argument was commenced by Mr. C. N. Sterry, for plaintiff in error, and concluded by Mr. William C. Cochran, for defendant in error.

Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

29 (*Opinion.*)

And on the thirtieth day of October, A. D. 1899, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1899.

CALVIN HOOD, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Defendant in Error.

No. 1222. In Error to the Circuit Court of the United States for the District of Kansas.

Mr. C. N. Sterry (Mr. Eugene Hagan and Mr. I. E. Lambert were with him on the brief) for the plaintiff in error.
Mr. W. C. Cochran (Mr. J. McD. Trimble and Mr. W. H. Wallace were with him on the brief) for the defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

THAYER, circuit judge, delivered the opinion of the court:

This case was submitted at the same time, by the same counsel, on the same argument, and involves the same questions which have been considered and decided in the preceding case, Lantry *v.* T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri. For the reasons stated in the opinion in that case the judgment in the case in hand is affirmed, Judge Sanborn dissenting.

Filed October 30, 1899.

A true copy.
Attest: —— ——.

30 (*Judgment.*)

And on the thirtieth day of October, A. D. 1899, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

MONDAY, *October* 30, 1899.

CALVIN HOOD, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, Missouri. } No. 1222.

In error to the circuit court of the United States for the district of Kansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause

be, and the same is hereby, affirmed with costs, and that T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, have and recover against Calvin Hood the sum of twenty dollars for his costs herein and have execution therefor.

October 30, 1899.

(*Assignments of Error.*)

And on the thirtieth day of December, A. D. 1899, assignments of error were filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

C. HOOD, as Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, as Defendant in Error.

31 *Assignments of Error.*

Comes now C. Hood, plaintiff in error in the above-entitled cause, and complains of the defendant in error, T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, for that said T. B. Wallace, as such receiver, defendant in error in the above-entitled cause, did, on the 30th day of October, 1899, recover a judgment, by the consideration of the United States circuit court of appeals for the eighth circuit, in the above-entitled cause against the plaintiff in error, affirming the judgment of the United States circuit court for the district of Kansas, first division, theretofore entered in said cause against said C. Hood, plaintiff in error. A copy of the record in said cause in said court, duly certified, is hereto attached and made a part hereof. Plaintiff in error avers that there is error in said records and proceedings in this court in the above-entitled action in this, to wit:

1st. The United States circuit court of appeals for the eighth circuit erred in determining that the United States circuit court for the district of Kansas, first division, rightfully sustained the demurrer of the defendant, T. B. Wallace, as such receiver, to the first defense contained in the amended and substituted answer of plaintiff in error, C. Hood.

2nd. The United States circuit court of appeals for the eighth circuit erred in determining that the United States circuit court for the district of Kansas, first division, rightfully sustained the demurrer of the defendant, T. B. Wallace, as such receiver, to the second defense contained in the amended and substituted answer of plaintiff in error, C. Hood.

3rd. That said court erred in determining that the United States circuit court for the district of Kansas, first division, rightfully sustained the demurrer of the defendant in error, T. B. Wallace, as such

receiver, to the cross-petition in the amended and substituted answer of the plaintiff in error, C. Hood.

Wherefore said plaintiff in error, C. Hood, prays that a writ of error be issued in order that the errors above stated and set forth, if any there have been, may be duly corrected and full and speedy justice done the parties aforesaid in this behalf, and that the
32 plaintiff in error, C. Hood, be restored to all the rights lost by the erroneous ruling of the court herein complained of.

C. N. STERRY,
EUGENE HAGAN,
I. E. LAMBERT,
Attorneys for Plaintiff in Error.

(Endorsed:) In the United States circuit court of appeals for the eighth circuit. No. 1222. C. Hood, plaintiff in error, *vs.* T. B. Wallace, as receiver, etc., defendant in error. Assignments of error. Filed Dec. 30, 1899. John D. Jordan, clerk.

(*Supersedeas Bond.*)

And on the thirtieth day of December, A. D. 1899, a supersedeas bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

Know all men by these presents that we, Calvin Hood, as principal, and Charles J. Lantry, as surety, are held and firmly bound unto T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, in the full and just sum of twenty-five thousand ($25,000.00) dollars, to be paid to the said T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, — heirs, executors, administrators, assigns, or successors; to which payment, well and truly — made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of December, in the year of our Lord one thousand eight hundred and ninety-nine (1899).

Whereas lately, at the May term, A. D. 1899, of the United States circuit court of appeals *of the United States* for the eighth circuit, in a suit pending in said court between Calvin Hood, plaintiff in error, and T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, defendant in error, a judgment was rendered against the said Calvin Hood affirming a judgment heretofore rendered in the circuit court of the United States for the district of Kansas, and the said Calvin Hood *has* obtained a writ of error in the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said T. B. Wallace, receiver of the Missouri National Bank of
33 Kansas City, Missouri, citing and admonishing him to be and appear in the Supreme Court of the United States, at

the city of Washington, thirty days from and after the date of said citation:

Now, the conditions of the above obligation is such that if the said Calvin Hood shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

CALVIN HOOD. [SEAL.]
CHARLES J. LANTRY. [SEAL.]

Sealed and delivered in presence of—
—— ——.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

Calvin Hood, of lawful age, being first duly sworn, upon oath deposes and says that he is the identical party whose name appears on the foregoing bond, and that he is worth more than $100,000.00 over and above all exemptions, debts, and liabilities.

CALVIN HOOD.

Subscribed and sworn to before me this eleventh day of December, 1899.

[SEAL.]

GEO. F. SHARITT,
Clerk U. S. Circuit Court, District of Kansas.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

Charles J. Lantry, of lawful age, being first duly sworn, upon oath deposes and says that he is the identical party whose name appears on the foregoing bond, and that he is worth more than $100,000.00 over and above all exemptions, debts, and liabilities.

CHARLES J. LANTRY.

Subscribed and sworn to before me this eleventh day of December, 1899.

[SEAL.]

GEO. F. SHARITT,
Clerk U. S. Circuit Court, District of Kansas.

This is to certify that I have this day examined the bond accompanying the petition in the Supreme Court of the United States for a writ of error in the case of Calvin Hood, plaintiff in error, *vs.* T. B. Wallace, receiver of the Missouri National Bank of Kansas City, Missouri, defendant in error, for twenty-five thousand
34 ($25,000.00) dollars, and in my opinion the bond is perfectly good.

12, 11, '99.

WILLIAM C. HOOK,
U. S. District Judge, District of Kansas.

Approved, to operate as a supersedeas.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Dec. 18, 1899.

(Endorsed:) No. 1222. Calvin Hood, pl'ff in error, *vs.* T. B. Wallace, receiver, etc. Supersedeas bond on writ of error. Filed Dec. 30, 1899. John D. Jordan, clerk.

(*Writ of Error.*)

And on the thirtieth day of December, A. D. 1899, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the clerk's return thereto, is hereto attached and herewith returned:

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Calvin Hood plaintiff in error, and T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1222. Calvin Hood, pl'ff in error, *vs.* T. B. Wallace, receiver, etc. Writ of error. Filed Dec. 30, 1899. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of the United States circuit court of appeals, eighth circuit, at office, in the city of St. Louis, Missouri, this fourth day of January, A. D. 1900.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

36 *Citation.*

And on the thirtieth day of December, A. D. 1899, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with admission of service endorsed thereon, is hereto attached and herewith returned:

37 UNITED STATES OF AMERICA, *ss:*

To T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein Calvin Hood is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 18th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1222. Calvin Hood, pl'ff in error, *vs.* T. B. Wallace, receiver, etc. Original citation. Filed Dec. 30, 1899. John D. Jordan, clerk.

DEC. 27, '99.

We hereby admit of service upon us of a copy of the within notice.

T. B. WALLACE,
Receiver of the Missouri National Bank of Kansas City, Mo.,
By J. McD. TRIMBLE,
His Attorney.

38 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing thirty-seven pages contain a true copy of the portions of the transcript of the record printed pursuant to the stipulation of the parties, and upon which record said cause was heard, and full, true, and complete copies of all proceedings and record entries, including the opinion of said circuit court of appeals, in the case of Calvin Hood, plaintiff in error, *vs.* T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, No. 1222, May term, 1899, as the same remain on file and of record in my office.

I do further certify that the original writ of error, with my return thereto, is hereto attached and herewith returned, and that a copy of said writ of error has been lodged in my office for the use of the defendant in error.

I do further certify that the original citation, with the admission of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this fourth day of January, A. D. 1900.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

{ Ten-cent U. S. internal-revenue stamp, canceled Jan. 4, 1900. John D. Jordan. }

Endorsed on cover: File No., 17,601. U. S. C. C. of appeals, 8th circuit. Term No., 179. Calvin Hood, plaintiff in error, *vs.* T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Mo. Filed January 8, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 180.

C. J. BAXTER, PLAINTIFF IN ERROR,

vs.

T. B. WALLACE, AS RECEIVER OF THE MISSOURI NATIONAL BANK OF KANSAS CITY, MISSOURI.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JANUARY 8, 1900.

(17,602.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 180.

C. J. LANTRY, PLAINTIFF IN ERROR,

vs.

T. B. WALLACE, AS RECEIVER OF THE MISSOURI NATIONAL BANK OF KANSAS CITY, MISSOURI.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 2, 1900.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1899, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the first day of May, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twentieth day of February, A. D. 1899, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the district of Kansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in the case of C. J. Lantry, plaintiff in error, *vs.* T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri; which said transcript as printed, pursuant to the stipulation of the parties, for the use of the court on the hearing of said cause is in words and figures following, to wit:

1 United States Circuit Court of Appeals, Eighth Circuit.

C. J. LANTRY, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Defendant in Error. } No. 1221.

Stipulation as to Printing Record.

It is hereby stipulated and agreed by and between the parties to this action, that the record printed by the clerk of the court shall consist of the following parts of the transcript, filed February 20th, 1899, and that the clerk of the court in complying with the rules of the court in printing said record is authorized to have said record printed according to the terms of this stipulation.

1. Complaint (page 1).

2. Substituted and amended answer and cross-petition, filed August 15, 1898 (page 49–59). Said amended and substituted answer shall contain the amendment filed by stipulation of parties, which appears at page 65 of the transcript, as though said amendment had been originally incorporated in and was a part of the substituted and amended answer and cross-petition when it was filed August 15, 1898.

3. Demurrer to substituted and amended answer and cross-petition (page 61).

4. Order sustaining demurrer to the substituted and amended answer (page 63).
4*a*. Stipulation waiving jury (page 64).
5. Judgment (page 67).
5*a*. Bond on writ of error (page 68).
6. Assignment of errors (page 69).
6*a*. Petition for writ of error (page 70).
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7. Clerk's certificate of transcript (page 72).

W. C. COCHRAN,
Of Counsel for Def't in Error.
EUGENE HAGAN,
Att'y for Pl'ff in Error.

2 No. 1221. C. J. Lantry *vs.* T. B. Wallace, receiver, etc. Stipulation as to printing record. Filed Mar. 14, 1899. John D. Jordan, clerk.

United States of America to T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days after the day this citation bears date, pursuant to writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, eastern division, wherein C. J. Lantry is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said C. J. Lantry, plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Amos M. Thayer, judge of the circuit court of the U. S., this 24th day of January, A. D. 1899.

AMOS M. THAYER,
Judge of U. S. Cir. Court.

Service of the above and foregoing accepted this 2d day of February, 1899.

J. McD. TRIMBLE,
Per C. A. BRALEY.

No. 7542. United States circuit court for the district of Kansas, eastern division. C. J. Lantry, plaintiff in error, *vs.* T. B. Wallace, receiver, etc., defendant in error. Citation. Filed Jan. 24, 1899. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the district of Kansas, first division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit

court, before you, at the November term, 1898, thereof, between T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, as plaintiff, and C. J. Lantry, as defendant, a manifest error hath happened, to the great damage of the said C. J. Lantry, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected,

3 and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 25 day of March, 1899, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of January, in the year of our Lord one thousand eight hundred and ninety-nine. Issued at office in Topeka, Kansas, with the seal of the circuit court of the United States for the district of Kansas (first division), and dated as aforesaid.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas (First Division).

Allowed January 24, '99.
AMOS M. THAYER,
Circuit Judge.

UNITED STATES OF AMERICA, *District of Kansas,* } ss:

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the circuit court of the United States for the district of Kansas, first division.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas, Eastern Division.

No. 7542. United States circuit court for the district of Kansas, eastern division. C. J. Lantry, plaintiff in error, *vs.* T. B.
4 Wallace, receiver, etc., defendant in error. Writ of error. Filed Jan. 24, 1899. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

THEODERIC B. WALLACE, Receiver of the Missouri National Bank of Kansas City, Missouri, Plaintiff,
vs.
CHARLES J. LANTRY, Defendant.

Petition to Enforce Stockholders' Liability.

Plaintiff for cause of action states, that Missouri National Bank of Kansas City, Missouri, is a corporation organized under the act of Congress of the United States of America, relative to national banks.

That heretofore, to wit: on the 3rd day of December, 1896, plaintiff, Theoderic B. Wallace, was by the Comptroller of the Currency of the United States of America, duly appointed receiver of said Missouri National Bank of Kansas City, Missouri, and duly qualified as such receiver, and as such now has charge of all the property, effects and assets of said Missouri National Bank of Kansas City, Missouri.

Plaintiff is a citizen and resident of the State of Missouri, and defendant is a citizen and resident of the State of Kansas, first division.

At the time of the failure of said Missouri National Bank of Kansas City, Missouri, defendant was the owner and holder of two hundred shares of stock of said bank, of the par value of one hundred dollars ($100) per share.

That heretofore, to wit: on the 30th day of July, 1897, it appearing to the satisfaction of James H. Eckels, Comptroller of the Currency of the United States, that in order to pay the debts of said Missouri National Bank of Kansas City, Missouri, it was necessary to enforce the individual liability of the stockholders thereof as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States, said comptroller, by virtue of the authority vested in him by law, did on the said 30th day of July, 1897, make an assessment and requisition upon the shareholders of the said Missouri National Bank of Kansas City, Missouri, for two hundred and fifty thousand dollars ($250,000) to be paid by them ratably on or before the 30th day of August, 1897, and said comptroller did then and there make demand upon each and every one of the stockholders for one hundred dollars ($100) upon each and every share of the capital stock of said association held and owned by them respectively, at the time of the failure of said bank, and said comptroller
5 did order and direct the plaintiff to take all necessary proceedings, by suit or otherwise, to enforce to the extent aforesaid the individual liability of the said shareholders.

Defendant has been duly notified by plaintiff of said assessment, which said assessment, under the order of the Comptroller of the Currency aforesaid, was due and payable at the office of plaintiff on or before August 30th, 1897.

No part of said assessment has been paid, but the same is now due from defendant for which, to wit, twenty thousand dollars ($20,000) with interest at the rate of 6 per cent. per annum from August 30th, 1897, and costs, plaintiff prays judgment.

WM. H. WALLACE,
J. McD. TRIMBLE,
Attorneys for Plaintiff.

Indorsed: No. 7542. Theoderic B. Wallace, receiver of Mo. Nt. Bk. of Kansas City, plaintiff, *vs.* Charles J. Lantry, defendant. Petition to enforce stockholders' liability. Filed Oct. 30, 1897. Geo. F. Sharitt, clerk. W. H. Wallace. J. McD. Trimble.

* * * * * * *

In the Circuit Court of the United States for the District of Kansas, First Division.

THEODERIC B. WALLACE, Receiver of the Missouri National Bank of Kansas City, Missouri, Plaintiff,
vs.
CHARLES J. LANTRY, Defendant.

Amended and Substituted Answer.

Comes now the defendant, Charles J. Lantry, and by leave of court, alleges and shows to the court the following facts constituting his several defenses to the petition of the plaintiff filed herein:

First.

For his first defense to the several matters and things stated and set forth in the plaintiff's petition, defendant says:

That defendant denies that he is now, or ever has been, the owner of the two hundred (200) shares of stock alleged in plaintiff's petition to belong to him, save and except only as hereinafter fully stated and set forth, and not otherwise.

That a short time prior to the 18th day of April, 1896, D. V. Rieger, who was then president of the Missouri National Bank of Kansas City, Missouri, and had been president of said bank since its organization, solicited this defendant and one Calvin Hood,
6 to purchase some shares of the capital stock of said bank, and to become stockholders in said bank. That after having submitted to this defendant and the said Hood the proposition to purchase stock in the Missouri national bank, the said D. V. Rieger acting for and on behalf of the bank, and as its president, and through his and its agents, systematically began making efforts and holding out inducements to said defendant and Hood, to purchase said stock. It was persistently urged by the said D. V. Rieger, that it was the desire of the Missouri national bank, which he represented, and of which he was president, to have them own stock of the said bank, and their names connected with it, as they were men of means and large business acquaintance in the State of Kansas, and that their connection with the said bank would be of benefit to

it because it would attract and secure a large amount of Kansas business otherwise unobtainable. In said preliminary negotiations for the purchase of such stock in said bank the said D. V. Rieger represented that the bank was in a sound, healthy financial condition, free from debts, earning large profits, and paying dividends, and that he was ready and willing to submit to them a detailed statement showing its financial condition. Having become interested in the statements of said D. V. Rieger, and being induced thereby, this defendant, together with said Calvin Hood, called upon the said Rieger at the banking-house of the said Missouri national bank, at Kansas City, Missouri, with a view of investigating the condition of the said Missouri national bank, with the intention that if the condition of it was such as it was represented to be by the said D. V. Rieger, of purchasing some shares of its stock.

Defendant further alleges that the said D. V. Rieger, during these preliminary negotiations, was acting as president of the said bank and for the said bank, and during all the subsequent proceedings and negotiations hereinafter referred to in relation to the purchase of stock, and in the subsequent purchase of such stock of the said Missouri national bank by this defendant, he continued to act as president of the said bank, for the said bank, and with the full knowledge and authority of the said bank, and all the statements made by the said Rieger during the negotiations for the purchase of said stock, were made by the said D. V. Rieger as president of the said bank and with the full knowledge, consent and authority of said bank.

Defendant further alleges that immediately after having made said call at the place of business of the said Missouri national bank, he, the said defendant, and the said Calvin Hood, informed the said Rieger that they had been induced by his statements to in-
7 vestigate the condition of the bank with the view of purchasing some shares of its capital stock, and they then and there called on said Rieger for a full and complete history and detailed account of the business and financial condition of the said bank. The said Rieger at once promised to submit to them a faithful statement and history of the bank from its organization down to that time, and further agreed to submit such statement to any expert bank examiner that they might select, if they should desire him to do so. This defendant, together with Calvin Hood, then proceeded to investigate the condition of said bank and make full inquiries about its history, which said investigation covered the period of several weeks. The said D. V. Rieger represented to this defendant, while making inquiries into the history of said bank and its condition, that it was originally organized with a capital stock of five hundred thousand dollars ($500,000), all of which had been actually paid for by the subscribers thereto, and the money deposited as required by the banking laws. That some time in July, 1893, on account of the extreme stringency in money matters and panics, the Missouri national bank suspended, but upon a full investigation of the condition of the bank by the Comptroller of the Currency of the United States, and upon a full report of a national bank

examiner submitted to the Comptroller of the Currency, the bank was permitted to resume business. That the Comptroller of the Currency required the bank to reduce its capital stock to the extent of two hundred and fifty thousand dollars ($250,000), to cover any loss the bank might have sustained previous to that time. That this left outstanding the sum of two hundred and fifty thousand dollars ($250,000) of the capital stock, all of which had been actually issued to and paid for by the shareholders in said bank at that time.

That the said D. V. Rieger did then and there submit to this defendant a report by the Comptroller of the Currency, dated July 26th, 1893, in support of his statements, which was in words and figures as follows: "This bank (referring to the Missouri National Bank of Kansas City) suspended on the 17th inst., because of a run on the part of its depositors. There was nothing in its condition to warrant this run or occasion suspicion as to its solvency. It seems to have been prudently managed and its resources are unusually free from items of questionable value, there being no bad debts. The bank is solvent and should be permitted to resume." The said D. V. Rieger did then and there submit to this defendant a bulletin issued by the Comptroller of the Currency dated at Washington, D. C., July 28th, 1893, which was in words and figures as follows: "The Missouri National Bank of Kansas City, Missouri, having complied with the conditions imposed by the Comptroller of the
8 Currency, and its capital stock being unimpaired, has this day been permitted to reopen its doors for business. The bank opens with plenty of money on hand, and is wholly solvent and safe." That said D. V. Rieger represented to this defendant that the facts and statements contained in said report and in said bulletin were absolutely true and correct and that the Missouri national bank had been frequently examined after it had resumed business in July, 1893, by national bank examiners and experts, and that they had uniformly and truthfully reported the bank in good, healthy and prosperous condition. That the bank was entirely free from bad loans or unsecured paper; that all the paper held by the bank was fresh, clean paper and well secured, and that the interest on all the securities of said bank had been promptly paid, and that there was not among the assets of the said bank, a single item or piece of paper that had not been secured and kept alive as provided by the banking laws of the United States. A list of the securities and assets of the bank was submitted to this defendant by the said D. V. Rieger and it was represented by the said D. V. Rieger that each and every item on said list was worth its face value and was fully secured. It was further represented to this defendant by the said D. V. Rieger that the said Missouri national bank was, and had been since its organization, doing a large and profitable business, accumulating a large surplus and paying an annual dividend of six per cent. to the stockholders.

Defendant further alleges that after he had received said statements from the said D. V. Rieger, he secured the services of two expert bank examiners to examine the assets and condition of said

bank in defendant's interest and that the said D. V. Rieger made the same statements and representations about the assets and condition of said bank to these two expert bank examiners that he had made to this defendant, and induced them to believe such statements to be true, and to report to this defendant that such statements were true.

Defendant further alleges that, relying upon the representations of the said D. V. Rieger, so made to this defendant by said Rieger in his capacity as president of the said bank, and believing each, all and every of said representations to be true and correct, he agreed to and with the said Rieger as such president of said bank, to and he did then and there attempt to purchase one hundred (100) shares of the capital stock of the said bank, which the said Rieger represented was the property of said bank, which he represented to this defendant had been theretofore acquired by the bank in a lawful way, and did then and there pay to the said Rieger for said purchase, and as the price thereof, the sum of ten thousand dollars ($10,000) in cash, and received from the said Rieger a certifi-
9 cate of stock dated the 18th day of April, 1896, and numbered 612, and purporting to be issued by the said bank and under its seal as of that date, and that this certificate represented the two hundred (200) shares of stock that the defendant supposed he was purchasing, being the same stock mentioned and described in plaintiff's petition, for this defendant never at any time nor upon any occasion purchased or attempted to purchase any other stock of said bank for himself, and never at any time received for himself any certificate of stock purporting to be a certificate for stock of said bank other than the said certificate numbered 611.

This defendant further says that the said Missouri national bank received the money so paid by him for the purchase of said stock, to wit: the said sum of twenty thousand dollars ($20,000) and that the same was for the use and benefit of said bank.

And defendant further says that he continued to be the holder of said certificate of stock so issued and delivered to him as aforesaid without the knowledge or means of knowing that the said Missouri national bank was insolvent until on or about the 2nd day of December, 1896. From the time of the delivery of this certificate of stock to him, said bank was apparently doing a very large and prosperous business, having about a daily average of one million five hundred thousand dollars ($1,500,000) deposits, and having apparently on an average in good bills receivable, about one million three hundred thousand dollars ($1,300,000); that owing to the vast number of books and the complicated system of book-keeping of this bank, and the artful manner in which its insolvency was and had been secreted by the officers of said bank, no one, defendant alleges, except the officers having actual knowledge of the condition of the bank, could or would have supposed from any investigation that could have been made within any reasonable limit of time, that said bank was insolvent, or that any bills receivable were fictitious, fraudulent or dead paper, or that any of the representations so made to this defendant by said president of said bank were false and

untrue, or that it was the purchaser of a large amount of its own stock.

Defendant further shows that on or about December 2nd, 1896, he learned that there were rumors of the insolvency of said bank. That immediately after he had ascertained that there were rumors that the said Missouri national bank was in an embarrassed financial condition, and that there was any question as to its solvency, he began to make the most diligent efforts to ascertain the cause and foundation of said rumors and to ascertain the actual condition of said bank; that during said investigation, which was but a day prior to the suspension of said bank, the president, cashier and other officers of said bank firmly and persistently insisted that the said bank was in a good, healthy financial condition, and was perfectly solvent, as they had represented it to be; that the defendant was unable to ascertain at that time any information showing the real and actual condition of the bank beyond these representations of the officers.

Defendant further says that on December 3rd, 1896, the Comptroller of the Currency of the United States duly appointed the plaintiff as receiver of said Missouri national bank, to take charge of said bank and all of its assets, books, papers and records, and that the plaintiff immediately qualifying under said appointment, took the actual and exclusive control and possession of said bank and all its assets of every kind, nature and description, including all of its books, papers and records, and excluded every one, including the officers of said bank and this defendant, from the right or opportunity to make any inspection of said books, records, papers or assets of the said bank; that although repeatedly requested to give to this defendant and to his associates an opportunity of making a careful and complete investigation of the affairs and condition of said bank, after the same had passed into the possession of the plaintiff as such receiver, the said plaintiff persistently refused and denied such request. That after said bank was placed in the hands of a receiver by the Comptroller of the Currency, and all the books, papers and documents containing the history of said bank and its business transactions were turned over to the receiver, defendant called upon said receiver, who is plaintiff herein, and demanded of said receiver access to said books, papers and documents of said bank, which said receiver refused; that there was no other source from which he could ascertain the real history of said bank and its business transactions or ascertain its real condition. That he frequently called upon said receiver and asked him for information as to its real history and actual condition, but that the only information he could get from said receiver, who is plaintiff herein, was that the said bank was solvent and under his said management as such receiver would pay all its debts, liabilities and obligations without making any assessment or call upon the stockholders. That said receiver continued to make said statements that said bank was in a solvent condition, to this defendant and other stockholders and parties interested, up to the time the order of assessment was issued by the Comptroller of the Currency, as alleged in the petition;

that by virtue of the statements and representations made by
11 the said receiver, this defendant was led to believe, and did believe, that the said bank was solvent and would pay all its obligations, and that its embarrassments were due to the complication of business matters and would only be temporary.

That said receiver between the time of his said appointment and the order of assessment issued by the Comptroller of the Currency, always maintained not only to this defendant, but to the creditors and stockholders of the bank, that he had full knowledge of the bank's actual condition after having made a most thorough examination, and that the assets of the said bank were sufficient to pay all obligations, liabilities and outstanding indebtedness of the said bank; that said receiver took active steps to prevent an investigation and would always contend with the creditors, stockholders and other parties interested that such steps would not only result in no good, but would tend to embarrass him in the successful settlement of the bank's affairs.

That on or about the 1st day of September, 1897, upon repeated requests, the Comptroller of the Currency of the United States gave to this defendant and his associate, Calvin Hood, permission to inspect the assets, books and records of said bank, and to secure all information possible to secure from the same, as to the actual condition of the bank, and also permission to see the reports of the examinations made under the direction of the comptroller and the receiver. That thereupon, for the first time since the appointment of the receiver, the defendant was permitted to, and did make a careful and thorough examination into the actual condition and affairs of the bank.

Defendant further alleges that as a result of such investigation he, for the first time, learned the truth about the actual condition of the bank and its affairs, and for the first time learned that the said representations made by the said D. V. Rieger about the condition of said bank, were false, fraudulent and untrue, and that the said D. V. Rieger, when he made such statements, knew that they were false, fraudulent and untrue; that they were made by the said D. V. Rieger while acting as president of the Missouri national bank with a full knowledge of said bank and the directors and the managers thereof that they were false, fraudulent and untrue, and were made for the purpose of inducing this defendant and the said Calvin Hood to invest in the capital stock of said bank.

Defendant further alleges that at no time after its organization in 1891 was the Missouri national bank ever solvent or able to meet its debts. That no part of the original capital stock of said bank
12 was ever actually paid for as required by the banking laws of the United States, nor was any part of the reduced capital stock of two hundred and fifty thousand dollars ($250,000) ever paid for. That said capital stock had in many instances been issued to irresponsible parties and worthless notes taken therefor. That at the time said bank was represented by the said D. V. Rieger to be in good, sound financial condition, the said bank had on hand and included as a part of its good assets, fraudulent, fictitious and

worthless paper greatly in excess of its capital stock. That there was at that time, fraudulently concealed and covered up in paper represented to be good, fifty thousand dollars ($50,000) of said D. V. Rieger's personal indebtedness absolutely worthless; that the said bank never, from its organization, earned a dividend, but had paid out on dividends over seventy thousand dollars ($70,000) in order to fraudulently conceal and cover up the actual condition of the bank. That each and every of the representations made by the said Rieger as such president as hereinabove fully set forth and stated, were at the time they and each of them were made, absolutely false and untrue, and were well known to be false and untrue by the said Rieger at the time he made the same.

Defendant further alleges that the said D. V. Rieger, when he made these representations about the condition of the bank, well knew they were false, fraudulent and untrue, and they were made for the purpose of defrauding this defendant and inducing him to purchase the said stock that the said D. V. Rieger well knew to be absolutely worthless, and said D. V. Rieger when he made the representations to this defendant that the bank was solvent and in a good financial condition, well knew that the capital stock had never been properly issued or paid for; he knew that a large portion of said stock was claimed to be owned by said bank and knew that the bank had on hand notes and paper that were fraudulent, fictitious and worthless in a greater amount than the entire capital stock of the said bank, and knew the said bank had never earned a dividend, and knew that the said bank was and had been for a long time prior thereto hopelessly insolvent, but represented to this defendant that the bank was in a good condition as hereinbefore stated, in order to induce him to purchase the two hundred (200) shares of the capital stock of the said bank and defraud him of the said twenty thousand dollars ($20,000).

Defendant further alleges that he was induced by the said statements made by the said D. V. Rieger concerning the condition of said bank, and that the bank was in good condition, to purchase said stock; that at the time of the purchase he believed said statements to be absolutely true in every particular and was governed by them and such belief.

13 Defendant further alleges and charges the fact to be that the stock so attempted to be purchased by him from said bank, and for which said certificate above referred to was issued to him, was not at the time of its attempted purchase, nor has it ever been from that time since, of any value whatever.

Defendant further says that by reason of the facts hereinabove stated and set forth, there was no consideration ever received from the said bank for the payment of the said sum of twenty thousand dollars ($20,000) to it at the time of the attempted purchase of said stock.

Defendant further alleges that immediately after he had obtained the information which he did obtain, upon full investigation under the permission of the Comptroller of the Currency as aforesaid, and on or about the 27th day of October, 1897, he called at the

banking-house, the prior place of business of the said The Missouri national bank, being at the time the place where all the books, records and papers of said bank were situated and kept, and where the affairs of the bank were being adjusted by such receiver, and that at that time, finding only the receiver in possession and custody of said bank, its assets, books, records and affairs, and being unable to find any officer of said bank, defendant tendered to the plaintiff as such receiver, the said certificate of stock numbered 611, above referred to, for cancellation, notifying and informing said receiver that, owing to the fraud and deceit that had been practiced upon him by which he was induced to purchase or attempt to purchase the stock represented by said certificate, that he disaffirmed the contract of purchase or pretended purchase of such stock and demanded that the said receiver should receive the certificate and cancel it and repay this defendant the sum of twenty thousand dollars ($20,000) so paid by him as aforesaid, or such proportionate part thereof as he would be entitled to receive as a creditor of said bank for that amount, all of which said tender and demand made upon the said receiver, the said receiver at that time and ever since then has continually refused to accept or accede to.

Defendant further charges the fact to be that, from the time the bank went into the hands of a receiver until the present time there has not been any officer of the said Missouri national bank living or residing within the State of Missouri upon whom any service of summons or other process could be had in any suit that might be commenced against the said Missouri national bank in the jurisdiction of the State of Missouri or any court therein, save and except only as the plaintiff, as such receiver, might represent said bank,

and that since December 3rd, 1896, the said Missouri na-
14 tional bank has had no usual place or no place of business whatever in the territory of the State of Missouri where process of summons against said bank could be left or served upon any person operating such place of business for and on behalf of the bank, save and except as process might be served upon the plaintiff as such receiver.

Second.

And for a second and further defense to the petition of the plaintiff filed herein, defendant says: That by reference thereto he hereby expressly makes each and all the facts hereinabove set forth and stated in the first defense, a part of this, his second defense, and in addition thereto, alleges and sets forth the following further facts:

That prior to and during the negotiations with this defendant and said Calvin Hood, the president, cashier and other officers of said bank, knowing well the actual condition of said bank and knowing the said bank was insolvent, purchased or pretended to purchase from the stockholders or alleged stockholders of the said bank, with the funds of the bank, shares of the outstanding capital stock of the bank in order to prevent exposure by the stockholders owning such shares of the actual condition of the bank and the

threatened throwing of such shares on the market at prices which would advertise the insolvency of the bank to the public. That in order to prevent an open and apparent violation of law, and to deceive the public and the Comptroller of the Currency of the United States and his assistants and employés, the officers of the Missouri national bank engaged in the aforesaid transaction and transactions of buying and purchasing or attempting to buy and purchase such shares of its own stock so outstanding, would cause the certificates of such stock so purchased or pretended to be purchased, from the parties holding the same, to be endorsed by the parties to whom the certificates were issued, either in blank or in the names of the president, cashier or some one of the clerks or other parties connected with the said bank, and would then procure a delivery of such certificate so endorsed, pay for the same with money belonging to the bank or by surrendering notes held by the bank against such parties for such stock, or by payment of money and surrender of notes, and that then to account for the funds so used, the parties to whom said certificates would be assigned, or whom the bank pretended were the owners of such certificates, would make a promissory note or notes to the bank for the amount of money used in the purchase of such stock, such note or notes being payable to the bank, and unsecured except in so far as these certificates of stock were issued to secure the same; that all stock purchased or attempted to be purchased by the officers of the bank were paid for out of the funds of the bank and notes taken from these officers, agents and servants of the bank to the bank, to represent the funds so used. That each and every one of the persons engaged in this transaction and who executed any or all of these notes, was at the time, and ever since has been, absolutely, utterly and hopelessly insolvent to the full knowledge of every officer of the bank engaged in these transactions, at the time of the transactions. That such pretended and attempted purchase of each of said shares of stock was made by the bank directly with the owners or holders of such stock, or with the people in whose name such stock stood, to the knowledge of each one of the persons owning or holding said stock, or in whose name it stood, and that none of the transactions concerning the negotiations for the pretended purchase of such stock was made to or with the owners, holders, or the persons in whose name it stood, by any employees in whose name the certificates were taken or to whom the certificates were delivered in blank, save and except in the case of the president and cashier, who in such negotiations and pretended purchases were, to the knowledge of the people they were dealing with, acting for and on account of and in the name of the bank.

Defendant further alleges that in some instances, and perhaps all, the certificates of stock surrendered to the bank were cancelled and new certificates issued to these irresponsible parties who were to hold the same for the use and benefit of the bank; that owing to the fact that the entire history of these transactions so far as it appears in writing, was and is contained in the books, records and

papers of the Missouri national bank in the absolute and sole custody of the plaintiff in this case, *and* therefore the defendant is unable at the present time to give a more detailed statement and history of this transaction or to state from whom all these purchases were made or to whom these certificates were assigned, or by whom held, or to whom they may have been transferred. That none of said stock was taken or purchased or procured by the bank to prevent any losses or loss upon any debt or debts previously contracted in good faith, or purchased in any way authorized by law, but the same was purchased by the bank with its funds for the purpose of preventing such stock from being sold in open market and to prevent any investigation being made as to the actual condition of the bank by the parties owning the same. That said stock so purchased would be cancelled and new certificates be issued therefor in the name of the ostensible or pretended purchaser, and all of said stock purchases were made with the funds of the bank and (*in*) the depletion of the capital stock of said bank to the extent of said
16 purchases and in violation of law. That none of said parties to whom new certificates of stock were issued ever paid anything for said stock, nor did said parties ever pay or cause to be paid the notes executed to the bank, nor did they intend to pay said notes when they were executed, because they were executed for the fraudulent purpose of concealing the said stock purchased by the bank.

Defendant further alleges that at the time of the negotiations for the purchase of said stock, and at the purchase thereof, that the said bank had purchased with the funds of the said bank in the manner above set forth, about eighty thousand dollars ($80,000) of the two hundred and fifty thousand dollars ($250,000) of the reduced capital stock of said bank.

That during said negotiations with the president and other officers of said bank, by this defendant and said Calvin Hood, and at the time of the purchase of said stock as hereinafter set forth, the said president and other officers of said bank represented to this defendant and to the said Calvin Hood, who were investigating the condition of said bank, that all of the capital stock of said bank had been subscribed for and issued to *bona fide* and actual purchasers in good faith, and was then held and owned by such parties as stockholders of said bank except an amount of said capital stock which said bank then had on hand, which had been taken in by the said bank to prevent a loss on indebtedness which had been previously contracted in good faith, and which had been taken in by the bank without violating the banking laws of the United States. That said defendant believing said statements, did then and there purchase of the bank two hundred (200) shares of the capital stock of said bank of the par value of twenty thousand dollars, for which he then and there paid the said bank the sum of twenty thousand dollars ($20,000), and a certificate was issued to the said defendant by the said bank and which is numbered 611 as aforesaid.

Defendant alleges that at the time of the said purchase or attempted purchase by him of the said stock of the said bank, for

which said certificate was issued, the president and other officers of the bank, in order to have the books of the bank show correctly the amount of outstanding stock, caused some or all of said parties who held the certificates of stock in their names, which had been purchased for, by and on account of the bank, to surrender enough of such certificates for cancellation to the bank, so that the certificate which was issued to this defendant could be issued therefor and in the place thereof, and that immediately upon the surrender of such certificates by such parties to the officers of the bank, and without the
17 knowledge of this defendant, said certificates were cancelled by the bank and to an amount sufficient to enable it to issue the certificate so received by the defendant, which was immediately thereafter issued to the defendant. That said parties who held said stock never at any time received the purchase-money paid by this defendant for said stock, but the same was retained and kept by the bank. That, for the reason of all the books, papers and accounts of said bank being now in the hands of the receiver of said bank, the plaintiff herein, and this defendant not having access to the same, he is unable to set forth in detail the names of the persons so surrendering their stock, and amounts held by each one respectively, but alleges that all of said stock purchased by this defendant and the said Calvin Hood was a part of the said stock so fraudulently purchased or attempted to be purchased and held, as hereinbefore set forth, by said bank.

Wherefore, defendant demands that this action be dismissed and that the defendant recover from the plaintiff the costs of this action.

C. N. STERRY,
ISAAC LAMBERT,
EUGENE HAGAN,
Attorneys for Defendant, C. J. Lantry.

Cross-petition.

Comes now the defendant, Chas. J. Lantry, and for his counter-claim against the plaintiff, Theoderic B. Wallace, as receiver of the Missouri National Bank of Kansas City, alleges and shows to the court the following facts, to wit:

The defendant, Chas. J. Lantry, by reference thereto, hereby expressly makes and incorporates into this, his cross-petition and counter-claim, each, all and every of the facts alleged in his first and second defense in his answer hereinabove set forth contained.

Defendant further alleges and shows that, by reason of the facts stated and the fraud and deceit practiced upon him by the said Missouri National Bank of Kansas City, Missouri, and its officers, he, the said defendant, has been injured to his damage in the sum of twenty thousand dollars ($20,000) with interest thereon from the 18th day of April, 1896. Defendant further alleges that he has presented such claim to the plaintiff herein as such receiver, for allow-

ance as a claim against said bank, and that the same has been rejected and refused by the plaintiff as such receiver.

Wherefore plaintiff prays judgment against the said Theoderic B. Wallace, as receiver of the Missouri National Bank of
18 Kansas City, Missouri, upon the facts stated in this his counter-claim and cross-petition for the sum of twenty thousand dollars ($20,000) with interest thereon from the 18th day of April, 1896, and prays that said judgment may be ordered to be paid ratably by said receiver out of the assets and funds of said bank in his control and possession.

C. N. STERRY,
EUGENE HAGAN,
ISAAC LAMBERT,
Attorneys for Defendant, Chas. J. Lantry, in His Counter-claim and Cross-petition.

Indorsed: No. 7542. In the circuit court of the U. S. for the district of Kansas, first division. Theoderic B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, plaintiff, *vs.* Chas. J. Lantry, defendant. Amended and substituted answer. Filed Aug. 15, 1898. Geo. F. Sharitt, clerk.

* * * * * * *

United States Circuit Court for the District of Kansas.

THEODORIC B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, Missouri, Plaintiff,
vs.
CHARLES J. L. LANTRY, Defendant. } No. —.

Demurrer to Defenses and Cross-petition.

I.

Now comes plaintiff and demurs to that part of defendant's "amended and substituted answer" which is headed "first" and purports to be his "first defense" to the petition herein, and for cause shows:

I. That this is an action at law to enforce the statutory liability of defendant as a stockholder in the Missouri national bank, for the benefit of creditors of said bank, and said "first defense," if it constitutes any defense at all, is an equitable defense and cannot lawfully be set up in this case.

II. That said "first defense" is based upon alleged frauds, which were not committed by plaintiff or the creditors for whose benefit this action is brought, but were, as alleged, committed by the Missouri national bank, which is therefore a necessary party to the issues tendered by said defense, but is not a necessary or proper party to the original action.

III. That said "first defense" does not state facts sufficient to constitute a defense to the plaintiff's cause of action stated in the petition, or to entitle defendant to any relief as against plaintiff.

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II.

Plaintiff also demurs to that part of defendant's "amended and substituted answer" which is headed "second," and purports to be a "second and further defense" to the petition herein, and for cause shows:

I. That this is an action at law to enforce the statutory liability of defendant as a stockholder in the Missouri national bank, for the benefit of creditors of said bank, and said "second and further defense," if it constitutes any defense at all, is an equitable defense and cannot lawfully be set up in this case.

II. That said "second and further defense" is based upon alleged frauds, which were not committed by plaintiff or the creditors for whose benefit this action is brought, but were, as alleged, committed by the Missouri national bank, which is therefore a necessary party to the issues tendered by said defense, but is not a necessary or proper party to the original action.

III. That said "second and further defense" does not state facts sufficient to constitute a defense to the plaintiff's cause of action stated in the petition, or to entitle defendant to any relief as against plaintiff.

III.

Plaintiff also demurs to that part of defendant's "amended and substituted answer" which is headed "cross-petition," and for cause shows:

I. That the said "cross-petition," if it constitutes a defense or counter-claim at all, is an equitable defense or counter-claim which cannot lawfully be set up in this case, which is an action at law.

II. That said "cross-petition" is based upon alleged frauds, which were not committed by plaintiff or the creditors whom he represents in bringing this action, but were, as alleged, committed by the Missouri national bank, which is not a party to this action, and an offset or counter-claim against the bank itself cannot properly be set up by the stockholder in an action brought by the receiver to enforce the statutory liability of the stockholder.

III. That said "cross-petition" does not state facts sufficient to constitute a defense to plaintiff's cause of action as stated in his petition.

20 IV. That said "cross-petition" does not state facts sufficient to constitute a counter-claim in favor of defendant and against plaintiff, or to entitle defendant to any relief as against plaintiff.

WILLIAM C. COCHRAN AND
J. McD. TRIMBLE,
Attorneys for Plaintiff.

Indorsed: No. 7542. United States circuit court for the district of Kansas. Theodoric B. Wallace, as receiver, etc., pl'tf, *vs.* Chas. J. L. Lantry, def't. Demurrer to defenses and cross-petition.

Filed Aug. 15, 1898. Geo. F. Sharitt, clerk. W. C. Cochran and J. McD. Trimble, att'ys for plaintiff.

* * * * * * *

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

At a term of the circuit court of the United States of America, for the district of Kansas, begun and held at the city of Leavenworth, in said district on Monday the 6th day of June, 1898, proceedings were had, and appear of record in words and figures as follows, to wit:

WEDNESDAY, *Sept.* 21*st*, 1898.

THEODORIC B. WALLACE, Receiver, Plaintiff, }
vs. } 7542.
CHARLES LANTRY, Defendant. }

Now on this 21st day of September, 1898, this case coming on for hearing upon the demurrer of plaintiff to the answer and cross-bill of the defendant and plaintiff's motion to strike out said answer and cross-bill; counsel being fully heard, and the court being advised in the premises doth sustain said demurrer, to which order of the court the defendant duly excepted at the time, and by leave of court counsel for plaintiff withdrew their motion to strike out said answer and cross-bill.

Wherefore it is by the court considered, ordered, adjudged and decreed that defendant's answer and cross-bill be and the same is hereby adjudged insufficient to which order of the court the defendant duly excepted at the time and defendant is allowed ten days in which to file amended answer.

21 In the Circuit Court of the United States for the District of Kansas, Eastern Division.

T. B. WALLACE, Receiver, etc., Plaintiff, }
vs. } No. 7542.
C. J. LANTRY, Defendant. }

Stipulation for Waiver of Jury.

Now comes the plaintiff by his attorneys of record and comes the defendant by his attorneys of record and by agreement of the parties a jury and a jury trial is hereby waived herein.

T. B. WALLACE,
By W. H. WALLACE,
J. McD. TRIMBLE, AND
W. C. COCHRAN,
His Att'ys.

C. J. LANTRY,
By E. HAGAN,
C. N. STERRY,
I. E. LAMBERT,
His Attorneys.

Indorsed: No. 7542. T. B. Wallace, receiver, &c., plaintiff, *vs.* C. J. Lantry, defendant. Stipulation for waiver of jury and jury trial. Filed Dec. 15, 1898. Geo. F. Sharitt, clerk.

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UNITED STATES OF AMERICA, *District of Kansas*, } ss:

At a term of the circuit court of the United States of America, for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday the 28th day of November, A. D. 1898, proceedings were had, and appear of record in words and figures as follows, to wit:

THURSDAY, *December* 15, 1898.

Present: Hon. John A. Riner, judge.

T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Plaintiff,
vs.
CHARLES J. LANTRY, Defendant. } 7542.

This cause came on to — heard upon the petition and the evidence, the defendant being in default for an amended answer
22 or demurrer, and was tried on submission to the court, the right to a jury and a jury trial having been waived by both parties; upon consideration whereof the court finds that the allegations of the petition are true and that the plaintiff is entitled to recover of the defendant Charles J. Lantry, the sum of twenty thousand dollars ($20,000) with interest thereon from the 30th day of August, 1897, at the rate of six per cent. per annum.

It is therefore considered and adjudged that the plaintiff recover of the said defendant Charles J. Lantry, the sum of twenty-one thousand five hundred and fifty dollars ($21,550) together with interest thereon from this fifteenth day of December, 1898, and his costs herein expended taxed at $— to which finding and judgment defendant by his counsel excepts and on motion of defendant, execution is stayed for forty days, and sixty days from this date is allowed within which to prepare and settle a bill of exceptions.

Know all men by these presents, that we, Charles J. Lantry as principal, (—) are held and firmly bound unto Theodric B. Wallace, receiver of the Missouri National Bank, of Kansas City, Mo., in the full and just sum of thirty thousand dollars ($30,000.00) to be paid to the said Theodric B. Wallace, receiver as aforesaid, heirs, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 20" day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at the November term A. D. 1898, of the circuit court of the United States for the first division of the judicial district of Kansas, in a suit depending in said court between Theodric B.

Wallace, receiver of the Missouri National Bank, of Kansas City, Mo., plaintiff, and Charles J. Lantry, defendant, a judgment was rendered against the said Charles J. Lantry, and the said Charles J. Lantry has obtained writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Theodric B. Wallace, receiver as aforesaid, citing and admonishing him to be and appear in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now the condition of the above obligation is such, that if the said Charles J. Lantry shall prosecute said writ of error to effect,
23 and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

CHARLES J. LANTRY. [SEAL.]
D. B. ROBINSON. [SEAL.]
CLEMENT A. LAWLER. [SEAL.]
B. LANTRY SONS. [SEAL.]

Sealed and delivered in presence of—
Witness:
I. F. PARKER.

Witness:
J. C. FARRINGTON.

Approved by—
CASSIUS G. FOSTER, *Judge.*

Jan'y 23, '99.

No. 7542. United States circuit court, first division of the judicial district of Kansas. T. B. Wallace, receiver, *vs.* Charles J. Lantry. Bond. $30,000.00. Filed January 23d, 1899. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas, Eastern Division.

T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Plaintiff,
vs.
C. J. LANTRY, Defendant. } No. —.

Assignment of Errors.

The defendant in this action, C. J. Lantry, in connection with his petition for a writ of error herein, makes the following assignment of errors, which he avers occurred upon the trial of the cause, to wit:

1st. That the court erred in sustaining the demurrer of the plaintiff, T. B. Wallace, as receiver, to the first defense contained in the amended and substituted answer of defendant herein, C. J. Lantry.

2nd. That said court erred in sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the second defense stated and set forth in the amended and substituted answer of defendant herein, C. J. Lantry.

3rd. That said court erred in rendering a judgment in favor of plaintiff, T. B. Wallace, as such receiver, against the defendant, C. J. Lantry, upon the sustaining of said demurrer to the defenses contained in said amended and substituted answer of defendant, C. J. Lantry.

24 Wherefore, the defendant C. J. Lantry, prays that the judgment of said court heretofore rendered against him be set aside and held for naught, and that he be restored to all things which he has lost by the occasion of said judgment.

EUGENE HAGAN,
C. N. STERRY, AND
I. E. LAMBERT,
Attorneys for Defendant.

Indorsed: No. 7542. United States circuit court for the district of Kansas, eastern division. T. B. Wallace, as receiver, etc., plaintiff, *vs.* C. J. Lantry, defendant. Assignment of errors. Filed Jan. 24, 1899. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas, Eastern Division.

T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, Plaintiff,
vs.
C. J. LANTRY, Defendant. } No. —.

Petition for Writ of Error.

Comes now C. J. Lantry, the defendant above named, by Eugene Hagan, his attorney, and complains that in the record and proceedings, and also in the rendition of the judgment in the suit wherein T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, is plaintiff, and your petitioner C. J. Lantry, is defendant, tried in the circuit court of the United States for the district of Kansas, eastern division, and in which a judgment was rendered against your petitioner, C. J. Lantry, as defendant, on Thursday the 15th day of December, 1898, at the November, 1898, term of said court for the sum of $21,550 damages, and the costs of the action at $68.20, manifest error has intervened to the great damage of your petitioner, C. J. Lantry.

Wherefore the said C. J. Lantry prays for the allowance of a writ of error and such other process as may cause the errors (*mainiained*) in the rendition of such judgment to be corrected by the

25 United States circuit court of appeals for the eighth circuit, and for a reversal of said judgment for such errors

by said United States circuit court of appeals for the eighth circuit.

EUGENE HAGAN,
C. N. STERRY, AND
I. E. LAMBERT,
Attorneys for Defendant, C. J. Lantry.

Order Allowing Writ.

A writ of error is allowed, as herein prayed for.
Dated Jan'y 24th, 1899.

AMOS M. THAYER,
U. S. Cir. Judge.

Indorsed: No. 7542. Circuit court of United States for the district of Kansas, eastern division. T. B. Wallace, receiver, etc., plaintiff, *vs.* C. J. Lantry, defendant. Petition for writ of error. Filed Jan. 24, 1899. Geo. F. Sharritt, clerk.

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America, for the district of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in the case of Theoderic B. Wallace, receiver of the Missouri national bank, *vs.* Charles J. Lantry, defendant, No. 7542. I further certify that the original citation and writ of error are attached hereto and returned herewith.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 26th day of January, A. D. 1899.

GEO. F. SHARITT, *Clerk.*

[Cancelled 10c. revenue stamp.]

Filed Feb. 20, 1899.

JOHN D. JORDAN, *Clerk.*

26 In the Circuit Court of the United States for the Eighth Circuit, May, 1899, Term.

C. J. LANTRY, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, State of Missouri, Defendant in Error. } No. 1221.

C. HOOD, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, State of Missouri, Defendant in Error. } No. 1222.

Stipulation.

It is hereby stipulated and agreed by and between the parties to each of the above-entitled causes, that the plaintiff in error in each of said causes, may amend his assignment of error in the record therein, by adding as a fourth assignment in error, an assignment in error as follows, to wit :

4th. That said court erred in sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the cross-petition in the answer in said cause contained.

In briefing these causes, this amendment may be considered as one of the errors assigned and to be briefed.

C. N. STERRY AND
EUGENE HAGAN,
Attorneys for Plaintiff in Error.
WILLIAM C. COCHRAN,
Attorney for Defendant in Error.

1221. C. J. Lantry, plaintiff in error, *vs.* T. B. Wallace, as receiver, etc. Stipulation to amend record. Filed Apr. 29, 1899. John D. Jordan, clerk.

27 (*Appearance of Counsel for Plaintiff in Error.*)

And on the twentieth day of February, A. D. 1899, an appearance of Mr. Eugene Hagan, as counsel for the plaintiff in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following :

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

C. J. LANTRY, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver, &c. } No. 1221.

The clerk will enter my appearance as counsel for the plaintiff in error.

EUGENE HAGAN,
Att'y for Pl'ff in Error.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1221. C. J. Lantry, plaintiff in error, *vs.* T. B. Wallace, as receiver, &c. Appearance. Filed Feb. 20, 1899. John D. Jordan, clerk. Eugene Hagan, counsel for pl'ff in error.

(*Appearance of Counsel for Plaintiff in Error.*)

And on the twenty-fifth day of May, A. D. 1899, an appearance of Mr. C. N. Sterry, as counsel for the plaintiff in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

C. J. LANTRY, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver, etc. } No. 1221.

The clerk will enter my appearance as counsel for the plaintiff in error.

C. N. STERRY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1221. C. J. Lantry, pl'ff in error, *vs.* T. B. Wallace, rec'r, &c. Appearance. Filed May 25, 1899. John D. Jordan, clerk. C. N. Sterry, counsel for pl'ff in error.

28 (*Appearance of Counsel for Defendant in Error.*)

And on the twenty-sixth day of April, A. D. 1899, an appearance of Mr. William C. Cochran, as counsel for the defendant in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

C. J. LANTRY, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver, &c. } No. 1221.

The clerk will enter my appearance as counsel for the defendant in error.

WILLIAM C. COCHRAN.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1221. C. J. Lantry, plaintiff in error, *vs.* T. B. Wallace, as receiver, &c. Appearance. Filed Apr. 26, 1899. John D. Jordan, clerk. William C. Cochran, counsel for def't in error.

(*Appearance of Counsel for Defendant in Error.*)

And on the twenty-eighth day of April, A. D. 1899, an appearance of Mr. J. McD. Trimble, as counsel for the defendant in error, was filed in the clerk's office of said circuit court of appeals in said cause in words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

C. J. LANTRY, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver, &c. } No. 1221.

The clerk will enter my appearance as counsel for the defendant in error.

J. McD. TRIMBLE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1221. C. J. Lantry, plaintiff in error, *vs.* T. B. Wallace, as receiver, &c. Appearance. Filed Apr. 28, 1899. John D. Jordan, clerk. J. McD. Trimble, counsel for def't in error.

29 (*Order of Submission.*)

And on the twenty-fifth day of May, A. D. 1899, in the record of the proceedings of said circuit court of appeals in an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

THURSDAY, *May* 25, 1899.

C. J. LANTRY, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of Missouri National Bank. } No. 1221.

In error to the circuit court of the United States for the district of Kansas.

This cause having been called in its regular order, argument was commenced by Mr. C. N. Sterry, for plaintiff in error, and concluded by Mr. William C. Cochran, for defendant in error.

Thereupon this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the thirtieth day of October, A. D. 1899, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

30 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1899.

CHARLES J. LANTRY, Plaintiff in Error,
vs.
THEODORIC B. WALLACE, Receiver of the Missouri National Bank of Kansas City, Missouri, Defendant in Error.

No. 1221. In Error to the Circuit Court of the United States for the District of Kansas.

Mr. C. N. Sterry (Mr. Eugene Hagan and Mr. I. E. Lambert were with him on the brief) for the plaintiff in error.

Mr. William C. Cochran (Mr. J. McD. Trimble and Mr. W. H. Wallace were with him on the brief) for the defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

This suit was brought by Theoderic B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, the defendant in error, against Charles J. Lantry, the plaintiff in error, to recover an assessment in the sum of $20,000.00 which had been theretofore duly assessed by the Comptroller of the Currency against said Lantry as the owner of two hundred shares of stock in the Missouri National Bank of Kansas City, Missouri, which had previously become insolvent. The complaint was in the usual form and alleged that said bank was duly incorporated under the act of Congress of the United States relative to national banks, that it had become insolvent; that Theoderic B. Wallace was duly appointed receiver of said bank by the Comptroller of the Currency on December 3, 1896; that an assessment of $100.00 per share had been made by the Comptroller of the Currency on July 30, 1897; that the defendant Lantry was the owner of two hundred shares of the stock of said bank and that by virtue of the aforesaid assessment he was obligated to pay to the receiver the sum of $20,000.00, with interest at the rate of six per cent. per annum from August 30, 1897. The defendant below filed an answer containing two defenses separately stated and a counter-claim. In the first defense it was alleged in substance that the defendant, on April 18, 1896, purchased two hundred shares of stock in the aforesaid bank and received a certificate therefor; that the stock so purchased was represented by D. V. Rieger, the president of the bank, to be the property of the bank at the time of the sale, which the bank had theretofore
31 lawfully acquired; that he was induced to make the purchase by certain false and fraudulent representations which were made by said president and other officers of the bank concerning its financial condition, which false representations were set out at great length in the answer; that the stock was held by the defendant from the date of its purchase on April 18, 1896, until December 3, 1896, when a receiver of the bank was appointed on account of its insolvency; that after the appointment of a receiver, that officer had exclusive control of all the books, papers and assets of the bank and repeatedly assured the defendant when he applied for information that the bank was solvent and would pay all of its debts

and liabilities without recourse against the stockholders; that the defendant was lulled into security by such statements of the receiver and by reason thereof did not gain access to the books and papers of the bank until on or about September 1, 1897, at which time he was given access to the books and records of the bank by direction of the Comptroller of the Currency; that thereafter he discovered the falsity of all of the statements and representations on the faith of which he had been induced originally to purchase the aforesaid stock, and that he thereupon, on or about October 27, 1897, called at the prior place of business of said bank and there tendered to the receiver, who was in charge of said bank, the certificate for the two hundred shares of stock which he had received and demanded of said receiver that he should repay to him the sum of $20,000.00 which he had paid for said stock, or such proportionate part thereof as he would be entitled to receive as a creditor of the bank for that sum.

For a second defense the defendant repeated all of the averments which were contained in his first plea and in addition thereto he averred in substance that the president and cashier of the Missouri National Bank of Kansas City had acquired the stock which was eventually sold to him in the following manner, that is to say: That they had purchased the stock with the funds of the bank from other shareholders when the bank was insolvent to prevent such other shareholders from throwing the stock on the market at ruinous prices and thereby disclosing to the public the true condition of the bank; that the stock when so purchased with the funds of the bank had been transferred to clerks and other agents of the bank to conceal the character of the purchase; that such pretended purchasers had then given notes to the bank representing the amount of money that had been expended by the bank to acquire the stock; that the persons who thus gave notes to the bank representing the money that it had so expended were totally insolvent and never intended to pay their said notes; that all of these facts were concealed from the defendant until long after his purchase of the two hundred shares of stock in question and that the stock so as aforesaid sold to him was a part of certain stock amounting at its par value to $80,000.00, which the bank had so unlawfully acquired, whereas, at the date of his said purchase and long afterwards he believed it to be stock that the bank had lawfully acquired and had a good right to sell.

The counter-claim which the defendant interposed was in the nature of a cross-action against the Missouri national bank to recover the damages which the defendant had sustained by reason of the fraudulent representations that had been made by its
32 officers to induce the sale of the aforesaid stock, and such damages were pleaded as an offset against the comptroller's assessment.

These defenses were adjudged insufficient on demurrer (89 Fed. Rep., 11, 1023), whereupon a judgment by default was rendered against the defendant below in the sum of $21,550.00, he having declined to plead further. The writ of error which was sued out

by the defendant below presents the question whether the demurrer to the answer was properly sustained.

THAYER, circuit judge, after stating the case as above, delivered the opinion of the court:

While the defendant's answer is unusually lengthy and contains many allegations showing that he was grossly deceived as to the financial condition of the Missouri national bank by the false and deceitful statements of its officers when he was induced to become a purchaser of its stock, and that he was not guilty of negligence up to the time the bank failed, in failing to discover that he had been defrauded—yet, when the answer is carefully analyzed, it is manifest that the defendant seeks to escape from the assessment on two principal grounds: First, on the ground that he has lawfully rescinded the contract by which he purchased the stock, and reinvested the bank with the title thereto; and, second, on the ground that he never became the owner of any stock in the bank because the bank had wrongfully acquired it from other shareholders when it was in an insolvent condition.

It will be observed from the foregoing statement that the answer shows that the defendant became a registered shareholder of the insolvent bank on April 18, 1896, when it was a going concern, and that he remained such until it was placed in liquidation by the comptroller about eight months thereafter, to wit, on December 3, 1896. From the very nature of the business in which banks are engaged it must be presumed that between the last-mentioned dates the Missouri national bank incurred large obligations to depositors and to other creditors. Besides, the answer alleges, among other things, that one of the reasons which was assigned by the officers of the bank for soliciting the defendant to become a stockholder therein, was that he was a man of large means, with an extensive acquaintance in Kansas, whose connection with the bank would attract to it a large amount of patronage from that State. It must be assumed, therefore, that there are many creditors of the insolvent bank, who are now represented by the receiver, who became such subsequent to April 18, 1896, and it is probably true that there are some persons who became creditors of the concern because of the defendant's connection therewith as a large stockholder. It is immaterial, however, to the present discussion whether the answer does or does not show that certain persons became creditors of the bank after April 18, 1896, in reliance on the fact that the defendant had become one of its shareholders, since the creditors of a bankrupt company are entitled to nothing less than its whole outstanding capital stock as a fund for the payment of their claims, and because all persons are in law presumed to extend credit to corporations, and especially to national banks whose shares are subject to a double assessment, in reliance upon the amount of their issued capital stock, although they do not know accurately by whom
33 such stock is at the time held. Moreover, a creditor of a corporation, when he becomes such, is under no obligation to ascertain what representations, if any, may have been made to the

stockholders of the company to induce them to become such. Pauly *v.* State Loan & Trust Co., 165 U. S., 606, 611; Upton *v.* Englehart, 3 Dillon, 496, 504.

These considerations lead to the conclusion that within the rule which was enunciated by this court in two recent cases (Scott *v.* Latimer, 60 U. S. App., 720; 89 Fed. Rep., 843, and Newton National Bank *v.* Newbegin, 40 U. S. App., 1; 74 Fed. Rep., 135) the defendant's effort to rescind the purchase of the stock in question was wholly ineffectual and cannot be permitted to release him from the assessment which was made by the Comptroller of the Currency, so far as the creditors of the insolvent bank are concerned. In the Latimer case it was decided in substance that the receiver of an insolvent bank in suits of this character is armed with all the rights of creditors, which are very different from those of the corporation itself; that the liability of the stockholders of national banks to an assessment, in case of corporate insolvency, is a liability created by statute for the sole benefit of creditors; that the liability does not grow out of any contract between the corporation and its shareholders and that in the very nature of things it is a liability which cannot be released or discharged by any agreement between the corporation and its shareholders. It was also held in that case that even though a stockholder has been induced to become such through fraud which would render his purchase or subscription voidable as between himself and the corporation, or as between himself and the party from whom he acquired his stock, yet, if he has knowingly permitted himself to be registered upon the books of the corporation as a shareholder prior to its insolvency and has remained such for any considerable length of time and until insolvency supervened—he cannot then be permitted to rescind his purchase or subscription so far as the corporate creditors are concerned. In the Newbegin case this court recognized the right of the shareholder who was then seeking a rescission of his subscription on the ground of fraud, to rescind under the peculiar facts of that case, inasmuch as it appeared that all the creditors of the bank who were entitled to object to the rescission had been paid or had waived their right to object to the rescission; but in that case it was distinctly held that the right to rescind a subscription for stock should be denied to a stockholder who is registered as such when insolvency happens if he has been a stockholder for any considerable period or if debts remain unpaid which have been contracted since his subscription or purchase was made. It results, therefore, from the previous decisions of this court to which we have referred, that the first defense which was pleaded by the defendant in his answer, was without merit, and that the demurrer thereto was properly sustained.

In considering the second defense which was interposed by the defendant it is important to bear in mind that the two hundred shares of stock which he purchased from the bank was not void stock, but was stock which, according to the averments of the answer, had once been issued to other persons and had been reacquired

by the bank by purchasing it from such other persons to
34 prevent them from throwing it on the market at ruinous prices. It is necessary to infer from the averments of the answer that this stock had once passed the scrutiny of the comptroller and had been outstanding and had been held by other persons since the organization of the bank in the year 1891. The purchase of this stock by the bank under the circumstances disclosed by the answer was doubtless *ultra vires*, but the purchase in question did not render the stock void. In purchasing it the bank made an unlawful use of its funds for which the officers concerned in the transaction could have been held responsible, as for any other unlawful act, if the corporation had sustained damage; but in point of fact, by the sale of the stock to the defendant that portion of its capital which had been dissipated by the purchase was restored by the resale and no loss seems to have been incurred. We are at a loss to understand how this transaction on the part of the bank can operate to relieve the defendant from his liability as a stockholder in a suit brought by the receiver to recover a stock assessment which was levied solely for the benefit of corporate creditors. The sale of the stock to the defendant after the bank had purchased the same was not unlawful, since it operated to restore that part of the capital that had been retired and to that extent repaired the wrong which might otherwise have been done to the banks' creditors. National Bank of Xenia *v.* Stewart, 107 U. S., 676, 678. In the case last cited it was also decided that if a national bank wrongfully acquires its own stock, as by making a loan thereon, no one but the Government can be heard to complain after the contract has been fully executed, and in the case at bar the purchase of the stock was fully consummated and was no longer executory when the sale was made to the defendant. Inasmuch, then, as the stock was not void and the sale of the same to the defendant was not prohibited by law, we are of opinion that the defendant has no greater right to shield himself from his statutory liability to creditors because of the wrongful conduct of the bank in purchasing the stock from other shareholders, than he has to shield himself from liability because his purchase of the stock was induced by the fraudulent representations of the bank's officers. The creditors of the bank who must be presumed to have extended credit on the security afforded by the capital stock and the statutory liability incident thereto, cannot be deprived of such security, either by the fact that the defendant was fraudulently induced to become a shareholder or by the further fact that the bank had wrongfully acquired the stock which it subsequently sold to him, when it appears that he knowingly became a registered shareholder and remained such for eight months and until insolvency supervened and in the meantime enjoyed all the rights and privileges incident to that relation. The equity of the corporate creditors under such circumstances is superior to that of the stockholder and the latter cannot obtain a rescission of the fraudulent contract for the sale of the stock which would operate to the prejudice of the bank's depositors and other creditors. The second defense pleaded in the answer was therefore untenable.

Concerning the counter-claim which was pleaded by the defendant, it is only necessary to observe, that the same reasons which prevent the defendant from rescinding the contract for the purchase of the stock and thereby depleting the statutory fund for the benefit of the creditors which was created by the comptroller's assess-
35 ment—should likewise prevent him from offsetting against the assessment the damages incident to the fraud and deceit of the bank. That is a claim against the bank alone, growing out of the wrongful conduct of its officers, for which the corporate creditors are in nowise responsible, and according to well-established rules, such a demand cannot be interposed as a counter-claim in a suit where the receiver sues merely as the representative of creditors for the enforcement of a stock liability which was created by the statute solely for their benefit, and which cannot be enforced by the bank under any circumstances in a suit brought in its own name. In proceedings to liquidate the affairs of insolvent corporations where stockholders are called upon to pay amounts that remain unpaid on the capital stock it is invariably held that such stockholders will not be permitted to set off debts due to themselves from the corporation against stock assessments and thereby secure an advantage or preference over other creditors. Sawyer *v.* Hoag, 17 Wall., 610; Handley *v.* Stutz, 139 U. S., 417; Scammon *v.* Kimball, 92 U. S., 362. It is manifest, therefore, that in the case in hand the counter-claim should be rejected since the effort is to offset the bank's liability for an injury done to the defendant by the fraud and deceit of its officers against a demand which does not and never did exist in favor of the bank, but was created solely for the benefit of third parties. It is questionable, to say the least, whether a judgment recovered against the bank for the alleged fraud and deceit could be permitted to participate in the distribution of the fund created by the stock assessment until all contract obligations of the bank had been fully paid; but be this as it may, we are satisfied that the cross-demand in question cannot be entertained in the present action. It results from what has been said that the demurrer to the defendant's answer was properly sustained and the judgment below is therefore—

Affirmed.

SANBORN, circuit judge, dissenting:

I dissent from the conclusion reached and the views expressed in the foregoing opinion for the reasons stated in my dissenting opinion in Scott *v.* Latimer, 89 Fed. Rep., 843, 857–862; 33 C. C. A., 1, 15–20; 60 U. S. App., 720, 743–751.

Filed October 30, 1899.

36 (*Judgment.*)

And on the thirtieth day of October, A. D. 1899, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

MONDAY, *October* 30, 1899.

C. J. LANTRY, Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, Missouri. } No. 1221.

In error to the circuit court of the United States for the district of Kansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, have and recover against C. J. Lantry the sum of twenty dollars for his costs herein and have execution therefor.

October 30, 1899.

(*Assignments of Error.*)

And on the thirtieth day of December, A. D. 1899, there *was* filed in the clerk's office of said circuit court of appeals in said cause assignments of error of the plaintiff in error in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

C. J. LANTRY, as Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri, as Defendant in Error.

37 *Assignments of Error.*

Comes now C. J. Lantry, plaintiff in error in the above-entitled cause, and complains of the defendant in error, T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, for that said T. B. Wallace, as such receiver, defendant in error in the above-entitled cause, did, on the 30th day of October, 1899, recover a judgment, by the consideration of the United States circuit court of appeals for the eighth circuit, in the above-entitled cause against the plaintiff in error, affirming the judgment of the United States circuit court for the district of Kansas, first division, theretofore entered in said cause against said C. J. Lantry, plaintiff in error. A copy of the record in said cause in said court, duly certified, is hereto attached and made a part hereof. Plaintiff in

error avers that there is error in said records and proceedings in this court in the above-entitled action in this, to wit:

1st. The United States circuit court of appeals for the eighth circuit erred in determining that the United States circuit court for the district of Kansas, first division, rightfully sustained the demurrer of the defendant, T. B. Wallace, as such receiver, to the first defense contained in the amended and substituted answer of plaintiff in error, C. J. Lantry.

2nd. The United States circuit court of appeals for the eighth circuit erred in determining that the United States circuit court for the district of Kansas, first division, rightfully sustained the demurrer of the defendant, T. B. Wallace, as such receiver, to the second defense contained in the amended and substituted answer of plaintiff in error, C. J. Lantry.

3rd. That said court erred in determining that the United States circuit court for the district of Kansas, first division, rightfully sustained the demurrer of the defendant in error, T. B. Wallace, as such receiver, to the cross-petition in the amended and substituted answer of the plaintiff in error, C. J. Lantry.

Wherefore said plaintiff in error, C. J. Lantry, prays that a writ of error be issued in order that the errors above stated and set forth, if any there have been, may be duly corrected and full and speedy justice done the parties aforesaid in this behalf, and that the
38 plaintiff in error, C. J. Lantry, be restored to all the rights lost by the erroneous ruling of the court herein complained of.

C. N. STERRY,
EUGENE HAGAN,
I. E. LAMBERT,
Attorneys for Plaintiff in Error.

(Endorsed:) In the United States circuit court of appeals for the eighth circuit. C. J. Lantry, plaintiff in error, *vs.* T. B. Wallace, as receiver, etc., defendant in error. Assignments of error. Filed Dec. 30, 1899. John D. Jordan, clerk.

(*Supersedeas Bond.*)

And on the thirtieth day of December, A. D. 1899, a supersedeas bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause in words and figures following, to wit:

Know all men by these presents that we, Charles J. Lantry, as principal, and H. E. Lantry and Calvin Hood, as surety, are held and firmly bound unto T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, in the full and just sum of forty-four thousand ($44,000.00) dollars, to be paid to the said T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, heirs, executors, administrators, assigns, or successors; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of December, in the year of our Lord one thousand eight hundred and ninety-nine (1899).

Whereas lately, at the May term, A. D. 1899, of the United States circuit court of appeals of the United States for the eighth circuit, in a suit pending in said court between Charles J. Lantry, plaintiff in error, and T. B. Wallace, receiver of the Missouri National Bank of Kansas City, Missouri, defendant in error, a judgment was rendered against the said Charles J. Lantry affirming a judgment heretofore rendered in the circuit court of the United States for the district of Kansas, and the said Charles J. Lantry has obtained a writ of error of the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said T. B. Wallace, receiver of the Missouri National Bank of
39 Kansas City, Missouri, citing and admonishing him to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said Charles J. Lantry shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

CHARLES J. LANTRY. [SEAL.]
H. E. LANTRY. [SEAL.]
CALVIN HOOD. [SEAL.]

Sealed and delivered in presence of—

——— ———.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

Charles J. Lantry, of lawful age, being first duly sworn, upon oath deposes and says that he is the identical party whose name appears on the foregoing bond, and that he is worth more than $100,000.00 over and above all exemptions, debts, and liabilities.

CHARLES J. LANTRY.

Subscribed and sworn to before me this eleventh day of December, 1899.

GEO. F. SHARITT,
[SEAL.] *Clerk U. S. Circuit —, District of Kansas.*

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

Calvin Hood, of lawful age, being first duly sworn, upon oath deposes and says that he is the identical party whose name appears on the foregoing bond, and that he is worth more than $100,000.00 over and above all exemptions, debts, and liabilities.

CALVIN HOOD.

Subscribed and sworn to before me this eleventh day of December, 1899.

GEO. F. SHARITT,
[SEAL.] *Clerk U. S. Circuit Court, District of Kansas.*

This is to certify that I have this day examined the bond accompanying the petition in the Supreme Court of the United States for a writ of error in the case of Charles J. Lantry, plaintiff in error, *vs.* T. B. Wallace, receiver of the Missouri National Bank of Kansas City, Missouri, defendant in error, for forty-four thousand ($44,000.00) dollars, and in my opinion the bond is perfectly
40 good.

12, 11, '99.

WILLIAM C. HOOK,
U. S. District Judge, District of Kansas.

Approved to operate as a supersedeas.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Dec. 18th, 1899.

(Endorsed:) No. 1221. Charles J. Lantry, pl'ff in error, *vs.* T. B. Wallace, receiver, etc. Supersedeas bond on writ of error. Filed Dec. 30, 1899. John D. Jordan, clerk.

(*Writ of Error.*)

And on the thirtieth day of December, A. D. 1899, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

41 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between C. J. Lantry, plaintiff in error, and T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1221. C. J. Lantry, pl'ff in error, *vs.* T. B. Wallace, receiver, etc. Writ of error. Filed Dec. 30, 1899. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of the United States circuit court of appeals, eighth circuit, at office in the city of St. Louis, Missouri, this fourth day of January, A. D. 1900.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

42 And on the thirtieth day of December, A. D. 1899, a citation, with admission of service endorsed thereon, was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

43 UNITED STATES OF AMERICA, *ss:*

To T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein C. J. Lantry is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 18th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1221. C. J. Lantry, pl'ff in error, *vs.* T. B. Wallace, receiver, etc. Original citation. Filed Dec. 30, 1899. John D. Jordan, clerk.

DEC. 27, '99.

We hereby admit of service upon us of a copy of the within notice.

T. B. WALLACE,
Receiver of the Missouri National Bank of Kansas City, Mo.,
By J. McD. TRIMBLE,
His Attorney.

44 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing forty-three pages contain a true copy of the portions of the transcript of the record printed pursuant to the stipulation of the parties, and upon which record said cause was heard, and full, true, and complete copies of all proceedings and record entries, including the opinion of said circuit court of appeals, in the case of C. J. Lantry, plaintiff in error, *vs.* T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, in the State of Missouri, No. 1221, May term, 1899, as the same remain on file and of record in my office.

I do further certify that the original writ of error, with my return thereto, is hereto attached and herewith returned, and that a copy of said writ of error has been lodged in my office for the use of the defendant in error.

I do further certify that the original citation, with the admission of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this fourth day of January, A. D. 1900.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

{ Ten-cent U. S. internal-revenue stamp, canceled Jan. 4, 1900. John D. Jordan. }

Endorsed on cover: File No., 17,602. U. S. C. C. of appeals, 8th circuit. Term No., 180. C. J. Lantry, plaintiff in error, *vs.* T. B. Wallace, as receiver of the Missouri National Bank of Kansas City, Mo. Filed January 8, 1900.

No. 179 and 180.

FILED
DEC 24 1900
JAMES H. McKENNEY,
Clerk.

Brf. of Sterry & Hagen for P. E.

Supreme Court of the United States

October Term, 1900.

Filed Dec. 24, 1900.

C. HOOD,
Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri.
Defendant in Error.

TERM NO. 179.
(NO. 17,801.)

C. J. LANTRY,
Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri,
Defendant in Error.

TERM NO. 180.
(NO. 17,802.)

BRIEF FOR PLAINTIFFS IN ERROR IN EACH OF THE ABOVE ENTITLED CASES.

C. N. STERRY,
EUGENE HAGEN,
I. E. LAMBERT,
Attorneys for Plaintiffs in Error.

De Moss Bowers, Law Printer, 354 S. B'way, Los Angeles. Phone Green 1314.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1900.

C. HOOD, *Plaintiff in Error,* *vs.* **T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri.** *Defendant in Error.*	**TERM NO. 179.** (NO. 17,601.)
C. J. LANTRY, *Ptaintiff in Error,* *vs.* **T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri,** *Defendant in Error.*	**TERM NO. 180.** (NO. 17,602)

BRIEF FOR PLAINTIFFS IN ERROR IN EACH OF THE ABOVE ENTITLED CASES.

STATEMENT OF FACTS IN EACH OF THE ABOVE CASES.

These cases were commenced in the United States Circuit Court for the District of Kansas by the defendant in error, as receiver, to recover the assessment ordered by the comptroller of the currency, against the shareholders of the Missouri National Bank, of Kansas City, Missouri, for an amount equal to $100 per share.

COPY BOUND CLOSE IN CENTER

The petition in the case brought against C. Hood alleged him to be the owner of one hundred shares, the petition in the case against Lantry alleged him to be the owner of two hundred shares of the capital stock. In each case amended and supplemental answers, and cross-petitions were filed by the defendants. Each of these answers contained two separate and independent defenses, and also included a cross-petition to recover a judgment against the receiver for the amount paid to the bank for this stock; to each of these defenses and to each of the cross-petitions the receiver filed a general demurrer. These demurrers were, on hearing, severally sustained by the Circuit Court; no further amendments being made to the answers, judgment was finally rendered in the case against C. Hood, for the amount of the assessment claimed, to-wit: Ten Thousand Dollars ($10,000), with interest and costs, and in the case against the defendant C. J. Lantry, for the sum of Twenty Thousand Dollars ($20,000), with interest and costs.

Each of these cases were then taken upon a writ of error to the United States Circuit Court of Appeals, for the 8th circuit, and there, upon consideration, the judgment of the court below was affirmed in each case by a divided court. From these judgments of affirmance writs of error were taken to this court.

The facts stated in each of the two defenses and cross-petitions in each answer, to which the demurrers were sustained, are substantially as follows:

The Missouri National Bank of Kansas City, Missouri, was organized as a national bank in 1891, with a capital stock of $500,000, which apparently was all subscribed and paid for at the time of the organization. Early in July, 1893, this bank temporarily suspended payment. Upon its suspension the comptroller of the currency of the United States, after careful investigation into its affairs, determined that while the bank was in a sound financial condition, it should reduce its capital stock to $250,000, and that upon such reduction it would be permitted to continue its business as a national bank. The bank immediately reduced its capital stock

to the amount required by the comptroller, and on July 26, 1893, the comptroller issued two public bulletins as follows:

"This bank (referring to the Missouri National Bank of Kansas City) suspended on the 17th inst. because of a run on the part of its depositors. There was nothing in its condition to warrant this run or occasion suspicion as to its solvency. It seems to have been prudently managed and its resources are unusually free from items of questionable value, there being no bad debts. The bank is solvent and should be permitted to resume."

"The Missouri National Bank of Kansas City, Missouri, having complied with the conditions imposed by the Comptroller of the Currency, and its capital stock being unimpaired, has this day been permitted to reopen its doors for business. The bank opens with plenty of money on hand, and is wholly solvent and safe."

The bank continued in business at Kansas City from July 26, 1893, until December 3, 1896, when it was closed by order of the comptroller, and it and its business placed in the hands of the defendant in error, as receiver.

From the time of its original organization, until it was finally placed in the hands of the receiver, in December, 1896, the bank was absolutely insolvent, and in a wretched financial condition. Little or none of its capital stock (either as it was originally issued, or as it was left when it was reduced), was ever fully paid for, except, possibly, in some cases, by worthless and fictitious notes.

Prior to April 18th, 1896, of that year, the bank, through its president and cashier, sought to induce each of the plaintiffs in error (who were citizens of Kansas) to become connected with the bank, by the purchase of some of its capital stock. At the time of the negotiations with each of the plaintiffs in error, and at the time of the issuance of the certificates of stock to them, hereinafter set out, the bank was actually in a very bad condition, being utterly and hopelessly insolvent, on account of the lack of full payment in cash for its capital stock (all of which had been issued), bad loans, the withdrawal of money on fictitious notes and other paper, and on account of other reasons set forth in the answers. From the commencement of its organization up to late in the fall of 1896, the officers of the bank had so manipulated the books and assets of the

bank as to successfully conceal its actual insolvent condition from every one, including the comptroller and his examiners.

While the bank was in this condition the plaintiffs in error were induced to make an investigation into its affairs, by the false and fraudulent representations of its officers, with the view of becoming connected with it through the purchase of some of its capital stock; they made the most careful and searching investigation, as to the actual condition of the bank that it was possible for people situated as they were to make.

In this examination they found, not only the very favorable reports of the bank examiners, made from time to time, but also the certificates of character, and good standing, issued by the comptroller upon the re-opening of the bank on the 26th of July, 1893, as above set out. The plaintiffs in error employed to make this examination two expert bank examiners. These examiners were deceived, as had been the government examiners, and as finally were these plaintiffs in error, through the false and fraudulent representations of the president and cashier, and the false and fraudulent concealment of the facts, made by the manner in which the books were kept, and by the fictitious and forged bills receivable, and other fraudulent practices of these officers and others. At the very beginning of these negotiations, and from that time on, the president of the bank made to the plaintiffs in error, and to each of them, fraudulent and false representations, as to the condition of the bank, its resources and liabilities; representations that induced the plaintiffs in error, and each of them, to believe that the bank was perfectly solvent, and in the splendid condition that the comptroller believed it to be in when he issued to the public his bulletins above set out. The records of the bank at that time disclosed that the average daily deposits amounted to $1,500,000, and that its loans, in the shape of bills receivable, averaged about $1,300,000. While each of the plaintiffs in error believed and relied upon the false and fraudulent representations of the president and cashier, they left nothing undone, that was possible for men situated as they were

to do to fully acquaint themselves with the actual condition of the bank, before making the investment.

Prior to these negotiations certain stockholders of the bank induced the bank to purchase their stock from them, under threat to throw the stock they wished to sell on the market at such prices as would create exposure of the actual condition of the bank. The bank, under these threats, during the time referred to, attempted to purchase about 800 of its outstanding shares of capital stock, and paid to the stockholders holding the same the prices asked, either in cash belonging to the bank or by surrender of notes given by these stockholders in payment of the stock sought to be purchased, or by cash and by surrender of notes, as the case might be. Each of the persons engaged in these transactions knew that the bank was the real, actual attempted purchaser of the stock, and that its funds and its assets were being used in payment for the stock thus attempted to be purchased. In order to conceal the transaction from the knowledge of the government, and every one else the certificates for this capital stock held by the persons with whom these attempted purchases were made were either endorsed by such persons in blank or assigned to the name of some employe of the bank, and then delivered to the bank by the persons attempting to sell. The bank, upon receipt of the certificates, would substitute the worthless notes of insolvent employes of the bank for the cash paid, or assets used, by the bank in such attempted purchase. None of this stock, so attempted to be purchased, was taken, or purchased, or procured by the bank to prevent any loss or losses, upon any debt or debts previously contracted in good faith, or purchased in any way authorized by law, but was attempted to be purchased by the bank with its funds or assets for the sole purpose of preventing such stock from being sold in open market, and to prevent the owners of it from making an investigation into the actual condition of the bank. None of the parties in whose names the certificates for the capital stock attempted to be purchased was transferred ever paid anything for the stock, neither did they, or any of them, ever intend

to pay anything for the stock, or to pay any of the notes given to the bank to replace its funds used in the purchase of the stock, because it was agreed between them and the executive officers of the bank, that they should hold the stock in trust for the bank, and for its sole use and benefit. When the plaintiffs in error finally determined to purchase stock of the bank, they were informed by the president of it that the bank held some of its own stock, taken by the bank from debtors to prevent loss on debts previously contracted in good faith, and that the officers of the bank could purchase some more from friendly stockholders who were anxious to have plaintiffs in error become stockholders in the bank. Hood thereupon, about April 18, 1896, agreed to purchase one hundred shares of this stock from the bank at par value, to-wit: $100 per share, and Lantry agreed to purchase from the bank two hundred shares of the stock at par value of $100 per share, and Hood paid to the bank $10,000 in cash, and Lantry paid to the bank $20,000 in cash, and each received certificates for the number of shares of the capital stock alleged in the respective petitions filed in the court below by the receiver to be owned by them.

From the time the certificates of stock were issued to these plaintiffs in error up to the time the bank went into the hands of a receiver, nothing occurred in the management of the bank to arouse the suspicion of the plaintiffs in error, nor did they suspect anything until it was actually taken possession of by the receiver on December 3, 1896. At that time the books containing the history of the bank and the bank's affairs were turned over to the receiver and *plaintiffs in error were severally denied access to them.* They made persistent efforts to secure all information possible about the bank's condition after the receiver was appointed, but were prevented from doing so by the receiver persistently refusing and denying such request (Transcript p. 10), sometimes giving as an excuse assurances that the bank was solvent and would pay its debts. Not satisfied with these refusals made to them by the receiver, they made appeals to the comptroller to permit them to investigate and

ascertain the actual condition of the bank, and permission was finally granted to them about the first day of September, 1897, to make such investigation. They at once procured the services of an expert bank examiner, who secured for them a history of the bank, as far as it could well be done. As soon as this report was made to them by their expert, *they became aware for the first time* of the frauds that had been perpetrated upon them, and that the bank had been hopelessly insolvent since its suspension in 1893, if not from the beginning.

Immediately upon learning this, they tendered their stock back to the receiver and demanded the return of their money. It will thus be seen that they had made the most careful and prudent investigation of the bank's affairs before they attempted to purchase any stock, and when it went into the hands of a receiver, made every effort in their power to ascertain its actual condition, and that, as soon as they became aware of the condition at the time of their purchase, they at once tendered the stock back and rescinded the contract of purchase. The character of the frauds finally discovered were not those such as occur between parties who deal with each other at arm's length, but were frauds that had been so adroitly concealed and covered up that they had escaped the detection for years of directors, stockholders, depositors, creditors—and even the vigilance of one of the ablest comptrollers of the currency that had ever occupied that office, together with his large force of expert bank examiners upon whom was conferred by law not only ample power to make full investigation, but the absolute duty of guardianship over banks like this one for the purpose of detection of such frauds. Not only did these frauds escape the detection of the comptroller's office, but that very office had placed a barrier in the way of their detection by certifying to the world that the bank was in a healthy and prosperous condition at a time when it was in truth rotten. After it went into the hands of a receiver, these frauds were not brought to light and made known to the world by the only person who was clothed with the power and charged with the

duty to do so, but it was left for these defendants to secure, after many efforts, permission from the comptroller's office to do so, and thereby learn for the first time that which should have been disclosed willingly by the receiver to every one interested.

On August 30, 1897, prior to obtaining permission to investigate, and while no one unless it was the comptroller, his receiver and the officers of the bank, were aware of the facts stated, the comptroller of the currency ordered an assessment of $100 per share against each shareholder. Each of the plaintiffs in error refused to pay this assessment, pending the investigation they were engaged in making, and were thereupon sued.

The answer setting out in detail the facts above stated is found on pages 5 to 16 of the record in case numbered 17,602 (term No. 180), and pages 5 to 16, in case numbered 17,601 (term No. 179).

There is in each case practically three main questions presented by the sustaining of the demurrers in the court below, and the affirmance of its ruling, by the Circuit Court of Appeals, which are as follows:

1st. Did the certificates issued by the bank to the plaintiffs in error make the plaintiffs in error shareholders of the bank liable to the assessment ordered?

2nd. Did these plaintiffs in error under the admitted facts have the right to rescind their contract of purchase of this stock at the time when they attempted to do so, and relieve themselves from the liability of the assessment ordered?

3rd. Had the plaintiffs in error the right to present their claims against the receiver, for the money paid to the bank at the time of their attempted purchase of this stock in a cross-petition filed in these causes of action commenced by the receiver to recover these assessments?

Assignment of Errors in Case No. 17,601.

(Title of cause omitted.)

1st. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as receiver, to the first defense contained in the amended and substituted answer of defendant therein, C. Hood.

2nd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the second defense stated and set forth in the amended and substituted answer of defendant therein, C. Hood.

3rd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in favor of plaintiff, T. B. Wallace, as such receiver, against the defendant, C. Hood, upon the sustaining of said demurrer to the defenses contained in said amended and substituted answer of defendant, C. Hood.

4th. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the cross-petition in the answer in said cause contained.

Wherefore, the defendant, C. Hood, prays that the judgment of said court heretofore rendered against him be set aside and held for naught, and that he be restored to all things which he has lost by the rendition of such judgment.

Assignment of Errors in Case No. 17,602.

(Title of cause omitted.)

1st. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as receiver, to the first defense contained in the amended and substituted answer of defendant therein, C. J. Lantry.

2nd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the second defense stated and

set forth in the amended and substituted answer of defendant therein, C. J. Lantry.

3rd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in favor of plaintiff, T. B. Wallace, as such receiver, against the defendant, C. J. Lantry, upon the sustaining of said demurrer to the defenses contained in said amended and substituted answer of defendant, C. J. Lantry.

4th. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the cross-petition in the answer in said cause contained.

Wherefore, the defendant, C. J. Lantry, prays that the judgment of said court heretofore rendered against him be set aside and held for naught, and that he be restored to all things which he has lost by the rendition of such judgment.

POINTS AND AUTHORITIES.

FIRST POINT.

The Circuit Court erred in sustaining the demurrer to the second defense in each answer, as the admitted facts in each of such defenses clearly established the proposition that neither one of the plaintiffs in error were shareholders of the Missouri National Bank, at the time of the levy of the assessments sought to be collected in these actions.

I.

We briefly re-state the facts upon which this defense, in each case, is based:

The bank, having all of its capital stock outstanding, attempted, through its officers, to purchase 800 shares of such stock, from some of its shareholders, to prevent a threatened exposure, of its actual insolvent condition, by the parties holding such shares of stock. To carry out this scheme the officers of the bank took of its assets, a sufficient amount thereof, to pay for the purchase of these 800 shares to the holders thereof the prices agreed upon, and paying for the same, had the stock certificates, which had been issued therefor transferred, by the actual owners of these certificates and the stock represented by the same, either directly to the bank, or to some of its employes, to hold in trust for the bank. All parties to this transaction knew that the bank was using its assets to make this purchase, for the purpose stated, and for no other purpose, and that said purchase was being made for the bank. These transactions between the bank and its shareholders were bald, open violations of Section 5201 of the Revised Statutes of the United States, to the knowledge of all concerned. Upon receiving these certificates from its shareholders who owned them, the bank cancelled them, or a sufficient number of them, to enable it to deliver, without an apparent over-issue, a certificate to

plaintiff in error Hood for 100 shares, and a certificate to plaintiff in error Lantry for 200 shares (see printed Transcript, case No. 17,601, pages 12 to 15, and case No. 17,602, pages 12 to 15).

II.

That this attempted purchase of a portion of its own capital stock by the bank for the purpose admitted was *void* and not merely *voidable*, seems no longer to be an open question in this court, under the principles determined by it in the cases of:

California Bank v. Kennedy, 167, U. S., 362;
First National Bank of Concord v. Hawkins, 174 U. S., 364.

III.

The certificates, which were transferred to the bank, upon its attempted purchase of these 800 shares of stock, did not vest in the bank, either the possession of the stock, or the title to a single one of the shares, represented by such certificates. The certificates, *not being the stock itself*, but merely evidence of the ownership of the stock represented by them, could not, upon delivery to the bank, in direct violation of the provisions of the statute, divest the people transferring them, of their title to the stock, evidenced by such certificates.

Mr. Cook, in his work on Stock, Stockholders and Corporation Law (2nd ed.), paragraph 10, states the legal character of certificates of stock in corporations as follows:

"Certificate of Stock:—A certificate of stock is, from one point of view, a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the shareholder in the corporate property and franchises; it operates to transfer nothing from the corporation to the shareholder, but merely affords to the latter evidence of his rights. It should be clearly apprehended that the certificate is not the stock, but merely written evidence of the ownership of shares. Accordingly, it follows that shares have no 'ear marks'—that one share cannot be distinguished from another share—but that it is only the certificates which are distinguishable one from the other by their numbers and in other ways. The certificate, therefore, has value in itself only as evidence, and apart from the shares

which it represents, it is utterly worthless. And even as evidence, it is not in every case essential; it is merely a convenient voucher, which the shareholder has a right to receive if he asks for it. One element of its value to the shareholder is that it is prima facie evidence of his title."

Judge Thompson, in his recent work on Corporations, volume 2, section 2348, states the proposition as follows:

(The italics are ours.)

"And, first, it is to be observed that such a certificate is merely the paper representative of an incorporeal right, and that it stands on a similar footing to that of other muniments of title. It is not in itself *property*, but is merely the *symbol* or paper evidence of property. Hence, the proprietary right may exist without the certificate. Numerous cases accordingly hold that a person may acquire the rights and incur the liabilities of a shareholder, both to the corporation and to its creditors, although no certificate has, in fact been issued. Corporate shares have also been classed as 'securities.' And although they may be thus designated within the meaning of particular statutes, yet it is plain that they are not securities in the proper sense of the word. 'Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation in which he is a member.' The following further observations in the same line of thought were made by Mr. Justice Crockett: 'If a firm doing business as an ordinary partnership issue certificates to each of its members, specifying the interests of the respective copartners, such certificates would have no intrinsic value, except as evidence of the *quantum* of interest of each copartner. The joint interest of the copartner in the property and business of the firm is the substance of the existence of which the certificate is but the evidence. If, for example, there be three copartners, each owning an undivided interest of one-third, there is no appreciable difference between the respective interests. They are in all respects precisely similar, and each several interest is an exact duplicate of the others. The same principle is applicable to corporations. The holder of ten shares of stock stands precisely upon the same footing as any other holder of ten shares. Their interests are precisely similar and of the same value, and each holds but an undivided interest in the common property.' From the principle that the certificate is not the property itself, but merely the muniment of title, it has been held that the duties, privileges and responsibilities of the holder of it cannot be divested by the mere act of writing across the face of it the word 'cancelled,' and returning it to the secretary of the com-

pany. As a certificate is not necessary to make one a shareholder, *so the surrender of it to the company does not necessarily make the holder of it cease to be a shareholder.*"

See also:

Telegraph Co. v. Davenport, 97 U. S., 369;

St. Romes v. Levee Cotton Press Co., 127 U. S., 614;

Hammond & Co. v. Hastings, 134 U. S., 401;

Johnson v. Laflin, 103 U. S., 800;

National Bank v. Watsontown Bank, 105 U. S., 223.

The case of Burrows v. Niblack, decided by the Circuit Court of Appeals of the 7th circuit (84 Fed. 111), is precisely in point. This case was an action brought by the receiver of the Chemical National Bank of Chicago, to recover from Burrows $10,000 paid to him, by that bank for a hundred shares of its own outstanding capital stock, attempted to be purchased from Burrows, while it was a going concern. We quote from the opinion in this case, illustrative of the point in question, as follows:

(The italics are ours.)

"The principal objections urged are: (1) That the validity of the purchase by the bank of its own stock can be questioned only by the government; (2) That the alleged liability of the bank for the return of the money can be enforced only in a court of equity; and, (3) That a tender back of the shares of stock purchased, was essential to the right of recovery of the price paid. The first objection is based upon that line of decisions of which illustrations are found in Bank v. Matthews, 98 U. S., 621; Bank v. Whitney, 103 U. S., 99; and Thompson v. Bank, 146 U. S., 240, 13 Sup. Ct., 66; but the present case, as we think, is governed rather by the principles declared in McCormick v. Bank, 165 U. S., 538; 17 Sup. Ct., 433; and Bank v. Kennedy, 167 U. S., 362; 17 Sup. Ct., 831, where the line of cases mentioned is distinguished. The transaction here in question was not a purchase made for the purpose of preventing, or which was necessary to prevent, loss upon a debt previously contracted, but as set forth, it was a bald purchase by the bank of its own stock for cash, and necessarily involved for the time being a reduction *pro tanto* of the corporat stock. Even if it were not forbidden by the statute, the transaction would be inconsistent with public policy and with established principles of law. The suggestion that a reduction of stock by a national bank may be lawfully made under section 5143 of the revised statutes is irrelevant because it is not shown, and

without proof is not to be presumed, even if it were conceivably possible, that this transaction could have been justified under the provisions of that section. The purchase was outside of and beyond the powers of the bank, and therefore, as a corporate act, was void from the beginning; and, while it appears from the agreement that the certificates of stock were endorsed in blank and delivered to the president of the bank, *the latter did not thereby acquire, nor the plaintiff in error part with, title to the stock.* The money having been unlawfully paid out, the bank had an immediate right of action to recover it in an action of assumpsit. *It was not necessary to go into equity nor to offer a return of stock.*"

This Court has practically held that in such case it is not necessary to make any tender or demand.

Pence v. Langdon, 99 U. S. 578.

IV.

The shareholders, from whom these 800 shares of the bank's capital stock, was attempted to be purchased by the bank, remained, after the transfer of the certificates to the bank, or its employes, just as much, the owners of the stock, attempted to be transferred, as they were prior to such attempted transfer. They were the persons, whom the receiver, should have called upon to pay these assessments, instead of calling upon the plaintiffs in error. It has been constantly held, by the Federal Courts (including this court) that the real owner, of the shares of capital stock, of an insolvent corporation, is the party who should be held liable, for assessment, where an assessment of stockholders for the benefit of creditors is authorized.

Pauly v. State Loan and Trust Co., 165 U. S. 606, and cases therein cited;

Stuart v. Hayden, 169 U. S., 1;

Lucas v. Coe, 86 Fed. 972.

V.

The certificates issued to Hood and Lantry, purporting to convey one, and two hundred, shares of its capital stock, were each for an actual over-issue of stock, and hence did not, make either Hood, or Lantry, a shareholder in this bank. In support of this

proposition, we quote from the text of Cook on Stockholders, etc. (4th Ed., Par. 292).

"By over-issued stock is to be understood stock issued in excess of the amouut limited and prescribed by the act of incorporation. Certificates of stock issued in excess of the certificates that represent the full authorized capital stock of the corporation represents over-issued stock. Such stock is spurious and wholly void. This is the settled law, and it prevails equally whether the over-issue is the result of accident or mistake, or want of knowledge of the law, or is due to fraud and intentional wrong-doing. The *animus* or intent of the parties to the over-issue is not material. Over-issued stock, no matter how over-issued, represents nothing, and is wholly and entirely valueless and void. So rigid and well stablished is this rule that not even a *bona fide* holder of such stock can give to it any validity or vitality."

The leading case upon this subject is that of New York, etc., R. R. Co. v. Schuyler, 34 N. Y., 30.

If these certificates, represented nothing but over-issued stock, under the decision of this court, (Scovill v. Thayer, 105 U. S., 143), neither Hood, or Lantry, acquired any rights as stockholders in this bank, or assumed any liability, for the assessments in controversy.

See also the decision of the United States Circuit Court of Appeals, eighth circuit, in the case of Laredo Improvement Co. et al. v. Stevenson (66 Fed., 633); and the following cases:

Kampmann v. Tarver (S. C. of Tex.), 29 S. W., 768;

Kellerman v. Maier, et al., 116 Cal., 416;

Christenson v. Eno, 106 N. Y., 97;

Andrews et al., v. National Foundry & Pipe Works, 22 U. S., C. C. A. Rep., 110;

Gillman v. Gross (S. C., Wis.), 72 N. W. R., 885;

Tschumi v. Hills (C. A., Kas.), 51 Pac. 619;

Follett v. Stevens et al., 43 Fed. Rep., 842.

In view of the above decisions, it seems to us that the reasoning of the court below upon this proposition was unsound (printed transcript, pages 29 to 39). The court below admits, that the transaction between the bank, and its shareholders, in the at-

tempted purchase of this stock, was *ultra vires*, but then proceeds to argue, that because the bank fraudulently took the money, of plaintiffs in error, and thereby restored its impaired assets, to that extent, the plaintiffs in error, were in no position, to take advantage of this transaction, for the purpose of relieving themselves, of the liability to an assessment. In other words, the court held: That the law imposed upon each of the plaintiffs in error, a penalty, for the sole reason, that the bank, had been able to defraud each of them, in a case, where neither of the plaintiffs in error, were guilty of any laches, holding further that, this penalty, was imposed for the sole benefit of persons who would have received precisely the same benefit, if the assessment had been levied against the real owners of the stock, who had attempted fraudulently to rid themselves of such a burden.

The court also held that only the government had the right to inquire into such transactions, although the transactions were prohibited both by the statute, and by public policy, overlooking the principles, determined by this court in the recent decisions in McCormick v. Market Nat. Bank (165 U. S., 538); California National Bank v. Kennedy, *supra;* First National Bank of Concord v. Hawkins, *supra.*

The majority of the court below, also overlooked the fact, that the transfer of the certificates, to the bank, was not the transfer of the stock itself, and overlooking this, assumed that the shares of stock, attempted to be sold to the bank, were themselves, in some way, transferred to the bank, and by the bank transferred to each of the plaintiffs in error. This will be seen by reading the opinion of Justice Thayer, from which we quote the following paragraph:

"The creditors of the bank who must be presumed to have extended credit on the security afforded by the capital stock and the statutory liability incident thereto, cannot be deprived of such security, either by the fact that the defendant was fraudulently induced to become a shareholder or by the further fact that the bank had wrongfully acquired the stock which it subsequently sold to him, when it appears that he knowingly became a registered shareholder and remained such for eight months and until insol-

vency supervened and in the meantime enjoyed all the rights and privileges incident to that relation."

That this position of the court is untenable, must, upon consideration be apparent. All will concede, that if the capital stock was all outstanding, at the time of the issuance of the certificates to the plaintiffs in error, that such certificates only represented over-issued stock, and under the decisions of this court in Scoville v. Thayer, and other cases cited), and would be absolutely void. The fact that Hood and Lantry for eight months severally acted as shareholders on the faith of such certificates being valid gave no validity to such certificates.

Can it be possible, that because of the fact, that prior to the issue of the two certificates, to the plaintiffs in error, the bank had attempted to purchase 800 shares of its capital stock, and had cancelled the certificates therefor assigned to it to the amount of the shares, attempted to be transferred to plaintiffs in error, that the certificates in question, were of any more validity, than they would have been, if at the time of their issuance, the bank had not made these attempted purchases, and all of its capital stock appeared to be (as it actually was) outstanding, upon the books of the bank.

If the position of the court below be correct, that the bank got actual possession of these 800 shares of capital stock as tangible things, through its transaction, and actually sold, and delivered 300 of these 800 shares to the plaintiffs in error, it would not follow that the plaintiffs in error, became shareholders, because it must be conceded, that the bank never got any title to any one, of these 800 shares; that neither it, or its receiver, would, under the decisions of this court, be estopped to say in any litigation whatever, that it did not acquire the title to a single share of this total of 800 shares.

Hence it follows that plaintiffs in error, by their purchase from the bank, got nothing, and should be no more estopped to say, that they did not acquire anything, than their assignor, or its receiver, would be estopped to say, the same thing, if upon a distribution of assets by the receiver, after paying the debts, the

plaintiffs in error claimed some part thereof as shareholders. If the receiver, had sued some of the shareholders, who transferred their certificates to the bank, to recover from them the assessment made against such transferred stock, could such shareholders have successfully defended, upon the ground, that although the transaction, between them, and the bank, was void, yet the bank was not injured thereby, having sold to the plaintiffs in error, the same shares of stock and that the plaintiffs in error, were the ones liable to such assessment, instead of themselves? We think it surely must be the law, that the receiver, could recover a judgment against any one or all of the parties, who attempted to transfer this stock, for the assessment of the stock attempted to be transferred. If this view be correct, would any court hold, that the plaintiffs in error would also be liable, for an assessment upon the same stock? No creditor has the right to ask for an assessment of any number of shares, of the capital stock, of an insolvent national bank, beyond the number actually authorized to be issued, or which may have been issued through some attempted compliance with an authorization therefor.

VII.

That the doctrine of estoppel as applied by the court, below, has no application, to one holding over-issued shares of stock, is, as it seems to us, thoroughly settled by the decisions of this court in Scovill v. Thayer, Bank v. Kennedy and Bank v. Hawkins, *supra.*

We had supposed that this point was thoroughly settled by the court below, in a decision rendered by it on March 4, 1895, in the case of Laredo Imp. Co. et al. v. Stevenson (66 Fed. 663), until it rendered its decision in the case at bar. We quote from the opinion in that case as follows:

"Is the defendant estopped by the fact that he once voted his stock, and that the officers of the corporation represented that its capital had been increased to $1,200,000, from asserting, against the creditors of the corporation, that the stock issued to him was void? This question must be answered in the negative. Where a corporation has power to issue stock or to increase its capital stock,

and this power is defectively or informally exercised, the acts and acquiescence of the stockholder may estop him from denying the validity of the stock or his liability therefor. Upton v. Tribilcock, 91 U. S. 45; Chubb v. Upton, 95 U. S. 665; Pullman v. Upton, 96 U. S. 328; Hadley v. Stutz, 139 U. S. 417, 425, 11 Sup. Ct. 530; Veeder v. Mudgett, 95 N. Y., 295, 310. But where the corporation is absolutely without power to issue the stock, or to increase the capital stock above a certain limit, no act or consent of the stockholder who receives stock issued without authority can estop him from denying the validity of the stock, or his liability therefor. The holder of such stock is under no obligation to pay for it, because he has received no consideration for such an obligation. The stock issued to him is absolutely void. He is not estopped to deny its validity, as against a creditor of the corporation, for the foundation of estoppel is deceit, and the creditor cannot be deceived as to the power of a corporation to issue such stock. He is bound to examine and know the law which limits the powers of the corporation with which he deals, and, whether he examines it or not, he is charged by the law with the knowledge of it. Scovill v. Thayer, 105 U. S. 143, 149; American Tube Works v. Boston Mach. Co., 139 Mass., 5, 29 N. E. 63; Reed v. Machine Co., 141 Mass. 454, 5 N. E., 852; Lathrop v. Kneeland, 46 Barb., 432; Merrill v. Gamble, 46 Iowa, 615; Merrill v. Reaver, 50 Iowa, 404; Clark v. Turner, 73 Ga., 1; Lincoln v. Express Co. (La.) 12 South, 937."

See also to same point:

Chemical Natl. Bank of New York v. Cal. Natl. Bank, 120 Cal., 601;

Kellerman v. Maier, et al., 116 Cal., 416;

Christenson v. Eno, 106 N. Y., 97;

Andrews, et al., v. Natl. Foundry & Pipe Works, 22 U. S. C. C. A., 110;

Gillman v. Gross, (Wis.) 72 N. W., 885.

Kampmann v. Tarver (Tex. S. C.), 29 S. W. R., 768;

Winters v. Armstrong, 37 Fed. 509.

Hayden v. Charter Oak Driving Park, 63 Conn. 142;

Page v. Austin, 10 Can. Sup. Ct. 132;

Clark v. Turna, 73 Ga. 1;

Insurance Co. v. Kamper, 73 Ala., 325;

Veeder v. Mudgett, 95 N. Y., 295;

Mallory, et al. v. Hananer Oil Works (S. C. Tenn.), 8 S. W. Rep. 396.

SECOND POINT.

The court below erred in sustaining the ruling of the Circuit Court upon the demurrer to the first defense in each answer.

FIRST.

The appointment of a receiver for this bank, and the making of the assessment ordered by the comptroller, did not limit or destroy, the right of either of the plaintiffs in error, to disaffirm their contract, with the bank, for the purchase of the shares of stock, from the bank, under the admitted facts stated in each of the defenses.

I.

Preliminary to the discussion of the proposition stated we recall the court's attention to the following facts, to wit:

The plaintiffs in error, at the time when these actions were brought, were still in utter ignorance of the actual condition of the Missouri National Bank of Kansas City. While at that time they had the right to assume that each of them had been induced to purchase this stock from the bank through fraudulent representations made by it, owing to its then inexplainable insolvency, yet the receiver, by his persistent refusal to permit them to investigate the books and other records of the bank, prevented their ascertainment of the actual facts in the case, which possibly would make a defense upon that ground. Subsequently, in September, when they finally obtained permission from the comptroller to make an investigation, the first find they made in such investigation, was the fact of the utter insolvency of the bank, from the time it commenced business, until the time its doors were finally closed; such fact at once disclosed, for the first time, to them, that the representations made to induce the purchase of stock were false and fraudulent, and entitled them to rescind their contract of purchase, which they at once did, and then plead the facts concerning the fraud and their rescission, in their answers, before the subsequent discovery, that the bank had no stock to sell. Subsequently, after the filing of

the first answers, setting out these defenses, the further investigation by their experts into the affairs of the bank revealed the fact that the bank did not own any stock at the time of its attempted sale of three hundred shares to them. Upon the ascertainment of this further fact, the present answer was filed, containing each of these defenses, as additional to those already filed. These parties, and their counsel, yet feel that, under the uncertainties of the situation, induced by the fraudulent system of keeping the books, and accounts, of the bank, each of these defenses should be maintained, to meet any possible proof, that may be made by the receiver. While each one of these defenses is distinctive from the other, each one is to some extent, interwoven with the other. The first defense sets out at length the sale to the plaintiff in error, Hood, of one hundred shares of stock, and to the plaintiff in error, Lantry, of two hundred shares of the capital stock of this bank, by the bank, under such fraudulent representations as would, without question, so far as the bank was concerned, entitle Hood, and Lantry, to severally rescind the contracts of purchase, and recover from the bank the price paid, at the time when the rescission was made.

These sales were made April 18, 1896, and the bank was put in charge of the receiver December 3, 1896. The receiver, upon taking charge of the bank, entered into and retained possession of all of its property, including the rooms and furniture, where it did business, and the executive officers of the bank, left the state of Missouri, prior to the discovery of the fraud, by the plaintiffs in error.

Plaintiffs in error, upon ascertaining the fraud practiced *at once* tendered to the receiver the certificates of stock, which had been issued to them, and demanded of him the repayment of the money paid by them to the bank for such stock. The receiver was at that time in sole possession of the bank, its rooms, and its assets, and he was the only one who could allow, at that time, these claims as claims entitled to participate in the distribution of such assets as he might thereafter distribute to creditors.

II.

Under the Kansas Code of Civil Procedure as construed by the Supreme Court of that state, the rule of the common law, with reference to the construction of pleadings demurred to, does not obtain; but on the contrary the rule in force in that jurisdiction, is, that not only every fact stated, or attempted to be stated, (however defectively) in pleadings, must, as against a demurrer, be construed, not only most favorably to the pleader, but only those presumptions, which are in favor of the pleader, (arising from the facts plead,) can be considered by the court in construing such pleadings.

Stewart v. Balderson, 10 Kas., 148;
Crowther v. Elliott, 7 Kas., 235;
Stringfellow v. Alderson, 12 Kas., 112;
McPherson v. Kingsbaker, 22 Kas., 646;
State v. School District, 34 Kas., 241;
Street Railway Co. v. Stone, 54 Kas., 83.

Section 914 of the Revised Statutes of the United States, requires the adoption of this rule, by the Circuit Court, of the United States, for that district, in all common law cases, where it would be applicable.

Glenn v. Sumner, 132 U. S., 152;
Roberts v. Lewis, 144 U. S., 653;
Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S., 24.

Construing the allegations, in each of these defenses, against the general demurrers, filed to them, under either the rule of the common law, or the Kansas rule, it would be difficult to conceive of a more startling case of fraud, than that, which was perpetrated, upon each of the plaintiffs in error, by the bank itself, and which fraud admittedly, induced their several purchase of the 200 and 100 shares of its capital stock.

It will be admitted by all that the discovery of this fraud, at any time prior, to the appointment of the receiver, would have

given to each of the plaintiffs in error, the instant right, to rescind their several contracts of purchase, regardless of any question of solvency, or insolvency, of the bank at the time of the rescission.

Smith v. Reese River Mining Co., Law Reps., 2 E. Q. 264;
Venezuela Co. v. Kisch, Law Rep. 2 H. L., 99;
In re Brinsmead & Sons, 67 Law J., Ch. 11, 1 Ch. 104. 77 Law, 7 (N. S. 521);
Motor Co. v. Parnell, 75 Md., 113;
Tyler v. Savage, 143 U. S., 79;
Barnes et al., v. Gates (C. C. A., 4th Ct.), 89 Fed., 783.

II.

The right of one, who by fraud, has been induced to purchase, from a national bank, shares of its capital stock, to rescind such purchase, and thereby release himself, from the liability imposed by the statute, is based upon the proposition, that the liability of a shareholder, in a national bank, under the provisions of Section 5151 R. S., is, in most cases, voluntarily assumed, by the contract of purchase, and, therefore, in such cases, contractual in its nature, standing or falling, with the contract creating it. The failure on the part of the court below, to recognize this proposition is, we believe, the chief cause, for the decision complained of. The question whether this liability, under the provisions of similar statutes in various states, is a contractual one, or not, has been determined several times, by this court, and notably by it in its recent decision, in Whitman v. National Bank of Oxford (176 U. S., 559), where many of the authorities, are reviewed.

See also:

Hawthorn v. Calef, 2d Wall, 10;
Flash et al. v. Conn, 109 U. S. 371;
Richmond et al. v. Irons et al., 121 U. S., 27;
Stewart v. Hayden, 169 U. S., 1.

While every person, who becomes a creditor, of a national bank, has the right, to rely upon the fact, that if the bank, should become insolvent, while he remains a creditor, its registered share-

holders, would *prima facie* be liable to an assessment, equal to the amount, of the outstanding capital stock, held by them, yet one giving credit, to a national bank, has no right to rely upon the fact, *that any one individual shareholder, will remain such shareholder* (subject to the liability of the statute) *for any period of time*, however much such person's connection with the bank may have influenced the credit given; neither has such a person the right to *conclusively* presume that the names of those appearing on the list, of registered shareholders, upon the insolvency of a national bank, are all rightfully there.

Whitney v. Butler, 118 U. S., 655;

Stuart v. Hayden, *supra*.

Every creditor, or proposed creditor, of a national bank, is charged with the knowledge, that every shareholder, of such bank, can cease to be a shareholder, and relieve himself, from the liability, assumed by the ownership of some of its shares, at any time, either by the transfer in good faith, on the registry of the bank, of his shares of stock, to some one else, or by rescission of the contract, which created him a shareholder, when the right of rescission exists. To presume, therefore, (as did the court below) from the facts stated in each of these defenses, that during the connection of the plaintiffs in error, with the bank, their names obtained for it credit, it otherwise, would not have had, not only ignores the Kansas rule referred to, concerning presumptions arising from pleadings demurred to, but adds no argument against the right of each of the plaintiffs in error to rescind the contract at the point of time each did rescind. This several right on their part, to rescind their several contracts of purchase was created by the principles of the common law, and not by force of any statute. There being no statute giving the right to rescind, under facts such as are stated in these defenses, or under any state of facts for that matter, or fixing the time, within which such rescission should be made, the time, of the exercise of such right, is only limited, and controlled, by the requirements of the common law which created it. The only limitation imposed by the common law, as to the time,

when the right of rescission must be exercised, in this class of cases, is, that it must be exercised, within a promptly reasonable time after discovery, (by the party injured), of the fraud creating such right. The proposition above stated, is well illustrated, in the analogous cases of insolvency, where there has been an assignment, or a receiver appointed, and is also illustrated, by the decisions, under most bankruptcy laws. In such cases, it has generally, (if not universally) been held, that the assignment, or the appointment of a receiver, in no way affects rights, which could be asserted against an assignor, or bankrupt, if no assignment had been made, or receiver appointed. This is well illustrated, by the following decisions of this court, each of which, seems to us, very applicable:

Donaldson, assignee, v. Farwell, et al., 93 U. S., 631;
Yeatman v. Savings Institution, 95 U. S., 766;
Stewart v. Platt, 101 U. S., 738;
Porter v. Lazea, 109 U. S., 84.

Guided by the common law, (there being no statute), this, and other courts, have frequently held, that a receiver, of a national bank, upon his appointment, takes *all* of the assets of the bank (including the shareholders' liability), in trust, for the creditors and the stockholders, *subject to all claims, and defenses, that might have been interposed, against the insolvent corporation itself, with respect to any of such assets.*

Scott v. Armstrong, 146 U. S., 499;
Whitney, et al., v. Butler, 118 U. S., 655;
Briggs v. Spaulding, 141 U. S., 132;
Finn v. Brown, 142 U. S., 56;
Winters v. Armstrong, 37 Fed., 509;
Cutting, Receiver, v. Damerel, 88 N. Y. 411;
Hayes v. Shoemaker, 39 Fed., 319;
Young v. McKay, 50 Fed., 394;
Snyder v. Foster, 73 Fed., 136.

As stated by this court in the head-notes to the case of Scott v. Armstrong, *supra*:

"The receiver in such case takes the assets in trust for the creditors, and, in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed against the insolvent corporation."

See also:

Fourth Street Bank v. Yardley, 165 U. S., 653;

Yardley v. Philler, 167 U. S. 360.

The proposition as stated in Winters v. Armstrong, (37 Fed. 508) in reference to the question here discussed by the late Justice Jackson is as follows:

"The receiver stands in the shoes of the bank and can assert no rights against the subscribers which the bank could not have asserted."

One of the most important assets, that is vested in a receiver of a national bank, is the liability of the shareholders, of such bank, to respond, to an amount equal, to the face value of the shares of capital stock, held by them. It is hard to perceive upon what theory a shareholder, might prevent the enforcement of any other liability by a receiver of a bank growing out of a contract made with the bank while it was a going concern, on the ground that such contract, was induced by the fraud of the bank, and yet not have the right, to make the same defense, against his liability as a stockholder, in a case, where he was induced to become a shareholder, through a contract with the bank procured by fraud, and in a case where he has not been guilty of laches, in not discovering the fraud, prior to the appointment of a receiver.

III.

Following the principles established by the authorities above cited, it has generally been held, in the United States, where the question has arisen, that the assignment of, or the appointment of a receiver, for a corporation, on account of insolvency, does not, of itself, cut off from a stockholder in such corporation, his right to rescind his contract of subscription, or purchase of stock, induced by the fraud of the corporation if he has not been guilty of laches, in asserting such right.

In the eighth circuit, until quite recently, this proposition was considered to be the settled law, of the federal courts, in that circuit, as will be seen, by reference to the following cases:

Upton v. Englehart, 3 Dill. 496, was a suit brought by the assignee of an incorporated company to recover on the stockholders' liability; the defendant pleaded that he was induced to purchase the stock by the fraudulent representations of the agent of the company, and that he was in no way bound thereby, and that he not long ago repudiated said purchase by refusing to pay any more of the installments. Judge Dillon held the plea to be defective, because it did not show that the defendant made use of reasonable diligence to make himself acquainted with the matters in respect of which the fraud is claimed, nor when or how he repudiated the contract. And after referring to Oakes v. Turquand, and other English cases in which it had been held that the defrauded shareholder must make application to have his name removed from the register of shareholders before winding up proceedings are instituted against the company, the learned judge says:

"These decisions are doubtless, in some degree, influenced by the special provisions of the English corporations act, of 1862; but the general course of reasoning therein is applicable to cases of insolvent or bankrupt corporations in this country. There is no register of stockholders in Illinois, and it is possible that the decisions in England requiring active steps by bill in chancery to have one's name removed from the register might not be applicable in their full extent here. Indeed, I am inclined to the opinion that if a company has fraudulently represented or concealed material facts, and thus drawn an innocent person into the purchase of stock, he at the time being guilty of no want of reasonable caution and judgment, and afterwards guilty of no laches in discovering the fraud, and he thereupon repudiates the contract and offers to rescind the purchase—these facts concurring, I am inclined to the opinion that the bankruptcy of the company, subsequently happening, will not enable the assignee to insist that the purchase of stock is binding upon him."

The late Justice Miller also held precisely the same doctrine in the case of Farrar v. Walker (3 Dill. 506).

We call special attention to the two decisions of the court below

in Newbegin v. Newton National Bank, et al. (one reported in 14 U. S. C. C. A., 71, and the other in 20 U. S. C. C. A., 339). The syllabus in the first decision in the case reads as follows:

"One induced to subscribe for certificates alleged to represent an increase of the capital stock of a national bank at a time when no increase had been authorized, upon false representations of the cashier as to the bank's condition and ability to pay dividends, it being, in fact, insolvent at the time, is entitled to a judgment against the bank and its receiver for the purchase money paid.

"In an action against a national bank and its receiver to recover money paid under false representations as a subscriber for an increase of capital stock, a jury being waived, the court found facts clearly entitling plaintiff to recover. It then further found that the certificates of stock were issued on July 22, 1890; that the bank had no authority to issue such certificates; that the increase of stock was not authorized until the twenty-fourth day of September, 1890; that plaintiff was guilty of laches in not returning said certificates and demanding his money until after the bank had passed into the hands of a receiver, and in not bringing his action to recover said money sooner. The court thereupon rendered judgment for defendants. *Held*, that there was nothing in the finding sufficient to support the conclusion as to laches, and that the judgment must be reversed."

The case was again tried in the lower court and the plaintiff recovered a verdict and judgment and the case was again appealed to the court below. In the meantime the Newton National Bank had been reorganized and in fact, made the defense, depending mainly upon the proposition that the rescission or disaffirmance, on the part of the plaintiff was not made sufficiently prompt, and that the insolvency and appointment of a receiver barred the right to make it at all. A very able and interesting opinion was delivered by Justice Thayer, which we quote at length from, as follows:

"A more important question to be next considered, is whether the Circuit Court should have directed a verdict for the defendants on the ground that the insolvency of the defendant bank, occurring before the suit was filed, precluded the plaintiff from rescinding his stock subscription. It has become the settled rule in England since the decision in Oakes v. Turquand, L. R. 2 H. L. 325, 344, that a suit to rescind a stock subscription on the ground of fraud cannot be maintained by a stockholder, no matter what diligence he may have shown, after proceedings have been taken to liquidate the affairs

of the corporation, on the ground of its insolvency, inasmuch as the rights of creditors of the corporation, both as against the corporation and those who are registered shareholders, then become superior to the rights of the defrauded shareholder. Stone v. Bank, C. P. Div. 282, 307; Wright's case, 7 Ch. App. 60; Kent v. Brickmaking Co., 3 Ch. App. 493; Thomp. Corp. Sections 1439, 1441; Cook Stock & Stockh., Section 163.

"In this country there are some cases in which a stockholder's right to rescind his subscription after the intervention of proceedings in bankruptcy or after the insolvency of the corporation has been denied; but, as Mr. Thompson well remarks in his Commentaries on the Law of Corporations (Sec. 1449), it does not appear in any of the cases that the denial of the right to rescind was grounded exclusively on the fact that proceedings in bankruptcy had been instituted, or that the corporation had become insolvent. Farrar v. Walker, 3 Dill. 506, note, Fed. Cas. No. 4679; Upton v. Tribilcock, 91 U. S. 45; Ogilvie v. Insurance Co., 22 How. 381, 391; Michener v. Payson, Fed. Case No.9525; Duffield v. Ironworks 64 Mich. 293, 31 N. Y. 310; Turner v. Insurance Co., 65 Ga.649; Ruggles v. Brock, 6 Hun. 164; Hurd v. Kelly, 78 N. Y. 588; Howard v. Turner (Pa. Sup.) 26 Atl. 753. In all of these cases the evidence showed that there had either been some lack of diligence on the part of the stockholder in discovering the fraud of which he complained, or unreasonable delay in asserting his rights after the discovery of the fraud, or active participation in the management of the corporation, or that debts had been contracted by the corporation subsequent to the subscription, which either gave to corporate creditors superior equitable rights, or estopped the shareholders, as against a corporate creditor, from asserting that he was not a shareholder. The question whether a stockholder should be permitted to rescind his subscription, on the ground of fraud, after the insolvency of the company, is attended with much doubt and difficulty because of the peculiar relation which a shareholder sustains to the creditors of the company. In the case of Upton v. Englehart, 3 Dill. 496, 505, Fed. Case No. 16, 800, Judge Dillon, while discussing the subject, pointed out that the unbending English rule above referred to was influenced in a measure by the companies act (25 and 26 Vict. C. 89), which makes provision for a 'register of stockholders' to which the public have access, and that as no similar register of stockholders is ordinarily kept in the United States, the English decisions holding that the commencement of a proceeding to wind up a company, is in itself, a bar to a suit for a rescission, are not strictly applicable to the conditions which prevail here. He concluded the discussion of the question as follows:

" 'I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts, and thus drawn an

innocent person into the purchase of stock—he at the time being guilty of no want of reasonable caution and judgment, and afterwards being guilty of no laches in discovering the fraud—and he thereupon, without delay, notifies the company that he repudiates the contract, and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company, subsequently happening will not enable the assignee to insist that the purchase of stock is binding upon him.'

"There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made, if the subscriber has actually participated in the management of the affairs of the corporation, if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud or in taking steps to rescind when the fraud was discovered; and, above all if any considerable amount of corporate indebtedness has been created since the subscription was made which is outstanding and unpaid—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern. There is some force, doubtless, in the view which has sometimes been taken by eminent judges that when a person has been inveigled into making a stock subscription by representations that were clearly false and fraudulent, he should be entitled to rescind his subscription, even after the insolvency of the company, under the same circumstances that would entitle him to rescind a contract of a different nature; that is to say, by proof of due diligence in discovering the fraud, and of prompt action after it was discovered. Upton v. Tribilcock, 91 U. S. 55, 56; Duffield v. Ironworks (Mich.) 31 N. W. 310, 316. See also, Improvement Co. v. Merrill, 2 U. S. App. 434, 2 C. C. A. 629, and 52 Fed. 77."

The case of the Florida Land and Improvement Company v. Merrill et al., decided in the Circuit Court of Appeals, sixth circuit, and reported in the 52 Fed. Rep. p. 77, is a case very much in point. We quote the second point of the syllabus which reads as follows:

"When bank stock is fraudulently sold, and the proceeds are turned over to the bank, and a receiver is subsequently appointed, no creditor of the bank can be said to have any such interest in the proceeds as would prevent restitution and a rescission of the sale; and such appointment of a receiver does not, in itself, show that there are creditors of the bank who have prior equities."

This case again went to the Circuit Court of Appeals and is reported in 60 Fed. Rep. 17. We quote the head notes of this decision, which read as follows:

"An intending purchaser of bank stock is entitled to rely upon a statement of its president as to the bank's condition, without inquiring further.

"The receipt by a bank of the proceeds of a fraudulent sale of stock belonging to it, and the subsequent appointment of a receiver, give its creditors no such right in the proceeds as will prevent the purchaser from rescinding the sale and requiring restitution. 52 Fed. Rep. 77; 2 C. C. A. 629; 2 U. S. App. 434, reaffirmed."

We quote at length from the decision of the late Justice Jackson, in Winters v. Armstrong, *supra* (37 Fed. Rep. 509), as follows:

"The claim made by one of the counsel for the receiver, that his position as the representative of creditors is better than that of the Fidelity National Bank, and that he can enforce rights on behalf of creditors which would not exist in favor of the association, is not sound as applied to a case like the present. When the conclusion is reached that Winters, Strange and Woods are only to be regarded and treated as subscribers for valid stock which has not been, and cannot be, issued to them by the association, the receiver cannot, in behalf of either the bank, stockholders or creditors, enforce against them any right which the association could not itself have asserted. A receiver cannot enforce the payment of subscriptions to stock which the corporation could not have enforced at the time of his appointment. Cutting v. Damerel, 88 N. Y. 410. In respect to contracts of this character the receiver occupies no position superior to that of the bank for the reason that the corporate management, while in charge of its business, just as much as a receiver after his appointment, represents the interests of all persons, creditors as well as shareholders. When the corporation is insolvent the rights of creditors in respect to the corporate assets become most prominent and a receiver appointed to administer or collect such assets is regarded as more directly the representative of creditors. In a certain class of cases a receiver may assert rights which the corporation could not, thus he may disaffirm illegal and fraudulent transfers of

corporate property and may recover his funds and securities which have been misapplied. The governing officers of a corporation cannot, for example, release a stockholder or a subscriber for its stock, for his obligation to pay, to the prejudice of creditors. They cannot return to stockholders the capital stock of the corporation, which constitutes a trust fund for the benefit of creditors, to the injury of such creditors. They can make no fraudulent disposition of the corporate property for their private benefit, or for the benefit of the stockholders, leaving creditors unprovided for. These and like transactions involving the misapplication or fraudulent disposition of corporate property a receiver may disaffirm, and recover such assets for the benefit of creditors, when the corporation might not be in a position to do so. Wood v. Downer, 3 Mason 308; Curran v. Arkansas, 15 How. 304; Burke v. Smith, 16 Wall. 390; New Albany v. Burke, 11 Wall. 96, and Sawyer v. Hoag, 17 Wall. 619, afford illustrations of the cases in which receivers may assert rights which the corporation or corporate management could not enforce. But the present case involves no such principle. Subscribers to the new stock, which they have not, and cannot obtain, are in no sense the recipients of the corporate property or assets which have been fraudulently or wrongfully divested, misapplied, or disposed of to the prejudice of creditors. The rights and obligations growing out of these subscriptions rest upon contract, and in respect to such matters the receiver stands precisely in the shoes of the association and can only enforce what it could have enforced at the date of his appointment, and is subject, so far as the assets of the bank are concerned, to the same obligations as the bank would have been under had it continued in existence and never passed into the hands of the receiver. The Fidelity National Bank could not, under the facts stated, have enforced the payment of the notes executed by Woods and Strange; neither can the receiver do so. Winters could have recovered his deposit made on his subscription as against the association, and he is entitled to its allowance as a valid claim against the assets of the bank in the hands of the receiver, so far as anything disclosed by the pleadings appears."

In the case of Beale v. Dillon, decided by the Court of Appeals of Kansas, and reported in the 47 Pac. Rep. 317, the court determines the following proposition, as appears from the head notes of the case, reading as follows:

"An assignee at law of an insolvent corporation may maintain an action against a delinquent stockholder therein to collect an unpaid subscription to the capital stock of such corporation, and in such action the stockholder may interpose the defense that he was fraudulently induced to become a subscriber to the capital stock through the

false and fraudulent representations of the corporation and its officers."

This question was considered and passed upon by the United States Circuit Court of Appeals of the seventh circuit, in the case of Andrews v. National Foundry and Pipe Works, 22 C. C. A. 110, 76 Fed. Rep. 166, and the above decisions practically followed.

The position contended for was sustained by the Supreme Court of Missouri in the case of Haskell v. Worthington, 7 S. W. Rep. 481.

The same court, in the more recent case of Ramsey v. Thompson Mfg. Co. et al., 22 S. W. Rep. 719, reaffirmed this decision upon a review of all the authorities. In this last case, Justice Burgess, in delivering the opinion of the court, states the position of that court as follows:

"And while Mr. Cook says that the decided tendency of the decisions in this country is that corporate insolvency is a bar to such rescission, and the fact that the subscription was obtained by fraud and fraudulent representations, is not available as a defense in a suit against the subscriber to compel the payment of his stock, this court seems to have held otherwise in the case of Haskell v. Worthington, 94 Mo. 560, 7 S. W. Rep. 481. Brace, J., in delivering the opinion of the court in that case, which was an action by the assignee of a corporation upon a subscription to its capital stock, to recover the par value of the shares for which the defendant had subscribed, held that, as the assignee stood in the shoes of the corporation, it was a good defense to show that the corporation had entered into actual business with less capital stock subscribed than the amount stated in its articles of incorporation, the defendant not having by his conduct estopped himself from setting up the defense; that the assignee occupied no better position than the corporation did."

See also:

Whitney et al., v. Butler, 118 U. S., 655.

We quote at length from the opinion of Chief Justice Campbell in the case of Duffield v. E. G. Barnum Iron Works Co., 64 Mich., 293, as follows:

"The question seems to be narrowed to the inquiry whether plaintiff is deprived of his remedy by the subsequent assignment. If there was no fault in not discovering the wrong, and if the

suit was brought before any opposing claims had obtained a preference, it cannot be said there was any waiver, and it is difficult to see anything which can be treated as an estoppel. There is no foundation in reason or in law, so far as we can discover, for holding that he is debarred of complaint because others have also been subsequently defrauded. A creditor who becomes such by fraud in obtaining his money for one purpose, has as distinct an equity as those who were afterwards defrauded or persuaded into giving credit for goods or supplies. Under our statutes stockholders are not personally liable to contribute beyond what will pay up their stock, and creditors cannot enforce any rights, under the assignment, against paid-up stock at all. But the suit of plaintiff is based on the claim that he never was properly to be considered a stockholder by the company, and, under this assignment, if anything, had remained unpaid on his shares, it would have been as a balance collectible by the company as his subscription, and not a debt due to creditors themselves as such. In England the winding up process is mainly to enforce contribution from shareholders, upon the theory that credit is given them as such. But even there it is very clearly held that the distinction taken between defrauded stockholders who sue before winding-up proceedings, and those who delay until after, does not depend upon any principle of estoppel in favor of creditors acting in faith of their membership, but upon the legal position which they are placed in by the winding-up proceedings whereby all persons registered as shareholders become, by operation of law, bound to contribute, because those proceedings themselves fixed their status.

"This is very clearly explained in Stone v. City and County Bank, Ltd., 3 C. P., Div. 282; and in that same case, where the authorities are reviewed and explained, it was strongly intimated that while after the proceedings begun for winding up, the plaintiffs could not avoid being treated as shareholders, they might have sued in that capacity for the damages incurred by the fraud of the company, which induced them to buy stock, and been treated as creditors for the damages.

"In Smith's case, before cited, it was expressly decided that creditors had no better claim than defrauded shareholders to sue for redress, and could not be preferred to them under circumstances which did not fix a legal priority. Lord Cairns there remarks: 'It is one of the risks, and it ought to be known that it is one of the risks which creditors are liable to in dealing with limited companies, that it may turn out that some person whose name has been entered as a shareholder in the list has a right to have his name taken off the list if he can prove that it has been fradulently inserted there, and if he comes with promptitude to have the fraud redressed.' In other words, it is considered that, unless personally in the wrong in some way, all creditors stand on an equal footing for redress until, by some process, which the law has

authorized to have that effect, they are placed on a different footing; and, if this is so, any remedy which is seasonably resorted to must be sustained.

"It is the settled law of this state that a creditor who has obtained security by attachment or otherwise before a general assignment cannot be deprived of his preference by that or any other subsequent action of his debtor. If he was defrauded, it is equitable that he should have a remedy; and if he has not contributed himself to mislead other creditors, there is no legal provision in this state to prevent him from seeking it in the same way as if no other creditors existed. None of our corporation statutes create any such difference in ordinary cases. How far it is done in the specific cases of personal liability existing in some instances by constitutional or statutory provisions, we need not inquire. The present case is no such case, and the assignee, or the receiver who represents him, only holds the property and rights of the corporation, and not rights which the company itself could not enforce, except perhaps where property of the company has been fraudulently transferred. In this respect it varies considerably from the English winding-up acts. But as the suit here preceded the assignment, it would have been in season even there.

"In our opinion the plaintiff had a plain right to maintain his action based on the fraud complained of, and the court below erred in holding otherwise. The judgment must be reversed and a new trial ordered. If the funds representing the attached property and reserved for this case are sufficient, without impairing the claim in controversy, the costs will be paid out of that. If not, they will be paid like other legal charges by the receiver."

In the case of Robinson v. Dickey et al. (14 Tex. Civ. App. 70), this question is passed upon as follows:

"1. Plaintiff, induced by false representations made to him by the officers of a bank, that the bank was solvent, and that the shares of stock which were to be delivered to him as part consideration were worth their face value, contracted to convey certain lots to the bank, on its agreement to erect a building thereon. The bank never completed the contract, further than to deliver the stock, and subsequently went into the hands of a receiver. *Held*, that plaintiff was entitled to a rescission of the entire contract on tender of the stock itself to the receiver."

See also recent decision of the Court of Chancery of New Jersey in Tierney v. Parker, 44 Atl. R., 151.

We call attention to the recent decision of the Circuit Court of the 9th Circuit in the case of Stufflebeam v. De Lashmutt, 101 Fed., 367.

Also to the very able and clear review of the authorities upon this question made by Chief Justice Robinson, in the case of Savage v. Bartlett, etc., 78 Md., 561.

IV.

The somewhat recent decision of the court below (by a divided court) in the case of Scott v. Latimer (89 Fed. Rep., 843), changed the rule in the Eighth Circuit, and practically decided (in advance of their reaching that court) the cases at bar.

As we read the decision in Scott v. Latimer, it is mainly placed upon the ground:

That the liability of a stockholder, is not contractual, but entirely statutory, and that although the contract, by which the stock is acquired, be induced by fraud, the rescission of such contract, cannot release the liability imposed by the statute (regardless, we should say, whether a receiver had been appointed or not). This, fully appears, from the 2nd, and 3rd, points of the syllabi, in the case, but more clearly, from the following extracts taken from the opinion of the majority of the court:

"If it be true that the subscription to the stock was obtained by false representations touching the pecuniary condition of the bank, that did not make the contract absolutely void but only voidable at the option of the subscriber; and, therefore, when the bank was put in liquidation, the corporate creditors had the right to enforce the statutory liability against all persons who were then stockholders. * * *

"Suits of this character, strictly speaking, are not actions based upon the contract of subscription existing between the corporation and the stockholder. * * * The right of the creditors to enforce the statutory liability against shareholders in a national bank is not dependent upon the terms of the stock subscription contract. * * *

"The liability sought to be enforced in this case is not one created by contract existing between the corporation and its stockholders, but is one created by statute in favor of creditors, and not in favor of the corporation. And it is a liability which cannot be affected, discharged, or released by any action taken by the corporation, or by the combined action or agreement of the corporation and its stockholders. * * *

"It is thus made clear that the liability sought to be enforced in this case is not dependent upon the terms, or in fact upon the

existence, of a contract of subscription to the capital stock of the bank, but it is a liability imposed by statute in favor of creditors, and it is a liability, as already said, which cannot be modified or released by any action on the part of the corporation, or of the corporation and its stockholders. It is created for the benefit of the creditors, and no action on the part of the bank can estop the creditors from enforcing their rights in this particular. * * *

"As already said, this suit is not based upon the contract of subscription between the bank and the plaintiff in error, and is not, therefore, an action wherein the issue can be made as to the voidability of that contract, as between the bank and the shareholders. The suit is on behalf of the creditors to enforce the statutory liability, in which the bank has no interest; a liability which was not created by any contract to which the bank was a party; a liability which it is beyond the power of the bank to modify, release, or discharge: and a liability which, if once called into existence by the act of one assuming the position of a stockholder, cannot be defeated, save by the creditors, or some one acting in their behalf."

That the theory of the majority of the court in this case, that the contract of subscription or purchase has nothing to do with this liability is untenable, we have already seen.

We call attention of the court to the very vigorous, dissenting opinion of Justice Sanborn in this case, found on pages 856 to 865, quoting from it, as follows:

"It is held in those cases (the cases cited and relied upon by the majority of the court) that those who knowingly permit themselves in various ways to appear to be stockholders, those who were stockholders, but presented the false appearance that they were not, and those who fraudulently transferred their stock to irresponsible parties to escape liability, were estopped from defeating creditors of the corporation in their attempts to hold them as such. It is, indeed, repeatedly stated in those cases that the property of an insolvent corporation and the liability of the stockholder are a trust fund pledged for the benefit of the creditors; and that is equally true of every insolvent person. But in none of these cases —in no case cited by the court or counsel—was the holder of the stock duped into his place and liability by undiscoverable fraud. In none of them did any court hold that money obtained from, or liability imposed upon, a stockholder by fraud which he could not discover are a trust fund held for the benefit of the creditors of the corporation which perpetrated the fraud. Can a debtor by fraud confer upon his creditors any greater right to the property or liability of his victim than he gets himself? * * *

Why is not the right of one who is induced by fraudulent representations of a bank to buy its stock to a rescission of that sale

and a release of the liability it imposes superior to the claims of its creditors, or its receiver to enforce them? * * *

In all the cases cited by the majority either a valid contract of subscription of purchase existed, or the stockholders were estopped from rescinding a voidable contract, because they had acted as such after they knew, or might have known, the facts upon which they relied to avoid it. In the case at bar the contract was induced by fraud, and it was concealed by fraud. In this case no estoppel against the plaintiff in error can be sustained, because he did not know and could not learn the facts, and no duty to speak or act rested upon him until he acquired that knowledge, or means of knowledge.

The bank induced the plaintiff in error to play the part of a stockholder, and thereby to lose all the money he deposited with it, and to run the risk of liability to lose as much more by the same scheme of false representations of its solvency, of its flourishing condition, and of its increase of stock, which doubtless induced the creditor to take the bank's promise of repayment for the money he deposited with it. In such a case, why should not the right of the purchaser of stock who suffers the greater wrong be equal to that of the creditor who suffers less? Neither of them was aware of the fraud, neither of them did or could discover it until both were injured. Neither of them knowingly or negligently deceived the other, and, in my opinion, neither of them is entitled to estop the other from undoing the fraud from which they suffer."

See also, McClenathan v. I. L. & I. Co., (Va.), 30, S. E. R., 450.

V.

The decisions of the courts in England followed by the court below do not militate against the proposition stated. The leading case of Oakes v. Turquand (L. R. 2, H. L., 325), and the subsequent cases, are each and all based upon the provisions of the English Act of 1862, entitled, "An Act for the Incorporation, Regulation and Winding Up of Trading Companies and Other Associations" (Ch. 89, 25-26, Vict). See appendix, where some of the provisions are set out. This Act contains some 212 sections, collecting into one code the provisions which were thenceforth to be applicable to incorporations of the character provided for in the Act. By this Act, a public officer was appointed for keeping a register of, among other things, the name of the projected company; a statement of the nature of its intended business; the amount of its capital; the names and addresses of

every subscriber, with the number of shares taken by him and the amount paid on each share. It further provides that the register shall be open to inspection, not only of the members, but all other persons, and that any person, whose name has been wrongfully registered may apply to any Superior Court of law for equity for a rectification of the register. In the event of the company being wound up the Act provides that every member shall be liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities.

Section 38 of the Act provides that shareholders within the preceding year, who have disposed of their shares, and are not registered at the time of the commencement of the winding up proceedings, shall, under certain circumstances and conditions, be liable to the payment of the debts, upon the winding-up of the corporation.

Shortly prior to the decision in Oakes v. Turquand, the House of Lords in the case of Railway Company v. Kisch (L. R. 2, H. L. 99), determined that one whose subscription to capital stock in an association was induced by fraud, had the right, upon the discovery of the fraud, to rescind his contract of purchase to the same extent as an individual would have the right in a contract between himself and another individual to rescind such contract for fraud.

Following this decision, came the case of Oakes v. Turquand, which we do not believe ever should have been construed as determining, under the Act, that the commencement of winding-up proceedings, against a corporation, cuts off the right of a shareholder, under any, and all circumstances, to rescind his contract, of subscription, and have his name removed from the register. This belief is strengthened by the head-notes to the case, a portion of which we quote as follows:

"Where a memorandum of association (which was registered) differed from the prospectus on which it professed to be founded, and on which as setting forth the true objects of the association, A, had become a shareholder, though he, on discovering the difference, might have repudiated his shares, he could not after the fail-

ure of the company, relieve himself from liability to contribute to the debts of the association, on the ground that he had been ignorant of something which, with proper diligence, he might have known."

"It is the duty of a person taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of the memorandum of association. He must take the consequences of the negligence." * * * "A, applied, on the face of statements in the prospectus, for shares in a limited liability company. They were allotted. His name was put on the register of shareholders. At the end of nine months the company failed. It was ordered to be wound up. A, then applied to have his name removed from the list of contributories;

"*Held*, affirming the decision of Malins, V. C., that it was properly placed there."

Conceding, however, for the sake of the argument, that this case, is as broad, as it has been construed to be, by some courts, and some text-writers, yet, it ought not to be an authority, in a case like the one at bar, as there are many notable distinctions, between the English Act, and the Acts of Congress, concerning national banks, some of which we call the court's attention to as follows:

There is no requirement in the national banking acts, that one, having a right from any cause, to have his name removed from the registered list of stockholders shall proceed, in a court, to compel the taking of his name, from the register. It must be conceded, that a shareholder, in a national bank, induced to become such by the fraud of the bank, may, while it is a going concern, make a common law rescission, of his contract of purchase, and relieve himself from all liability.

Whitney v. Butler, *supra*.

Neither is there any provision for a public registry of names of the shareholders, in any national bank, which may be examined, by the public at large, or by any one, who intends becoming a creditor of such bank. The provisions of Sec. 5210, R. S., after providing for the keeping of a list of the shareholders, with the names and residences, provides:

"Such list shall be subject to the inspection of all the shareholders and creditors of the association and the officers authorized

to assess taxes under state authority, during the business hours of each day in which business may be legally transacted. A copy of such list on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the comptroller of the currency."

As we have seen, there is no act of Congress which places a receiver appointed for a national bank, in any better position, as to the assets of the bank, than would the assignee of an individual insolvent for the benefit of creditors, be placed in, by the rules of the common law.

VI.

While some text-writers, and some courts, cite the decision, of this court, in Upton v. Tribilcock (91 U. S. 45), as a decision, supporting the supposed doctrine of Oakes v. Turquand, a careful examination of the opinion in the case will lead to the conclusion, that it is not an authority sustaining such view. The action in that case, was brought by the assignee of an insolvent company, to recover a stock subscription, and the defense was, that the subscription, had been procured by the false representations of the agent of the company. This court held, that these representations were, if anything, a misrepresentation as to the law, and were not misrepresentations as to the facts, and hence not the basis of a right to a rescission of the contract for fraud; but that if the representations, amounted to such fraud, as would give to the defendant, in that case, the right of rescission, he had been guilty of *laches* in ascertaining the truth, or falsity of the representations, and especially guilty of *laches* in repudiating the contract of subscription. The right of the defendant in that case to repudiate the contract of subscription on the ground of fraud, apart from the question of *laches* on his part, even after the assignment, and the right to repudiate it, without a proceeding against the company to remove his name from the books of the company, is distinctly recognized by this court in that case, and there is no intimation by the court, in its opinion that it was too late after the assignment, to rescind the contract of subscription. It seems to have been conceded, by the court,

that such a rescission could be made, had the defendant in that case, grounds for making the same, and had exercised the right promptly, without any *laches*.

The few other cases in other jurisdictions supporting the English doctrine do so solely on authority of the English cases, and upon the erroneous proposition that the liability is purely statutory and not contractual.

THIRD POINT.

The court below erred in affirming the ruling of the Circuit Court sustaining each of the demurrers to each of the cross-petitions.

I.

Each of these answers included in addition to the defenses referred to, a cross-petition, against the receiver (based upon the facts stated in each of the separate defenses), to recover a judgment for the amount paid to the bank for this stock asking that such judgment, when recovered, be paid by the receiver out of the funds in his hands, pro rata. The right to set up these counter-claims, in the answers, is given by sections 94 and 95 of the Kansas code stating what an answer can contain.

Section 94 * * *

"A statement of any new matter constituting a defense, counter-claim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition."

Section 95 reads as follows:

"The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action. * * *"

The facts stated in this cross-petition, under the decisions of the Supreme Court of Kansas creates a counter-claim that can be used as a set-off.

In the case of Fanston v. Linsley, 20 Kas. 235, the second and third points of the syllabus, are as follows:

"2. *When tort may be waived; benefit to wrongdoer.* Whenever one person commits a wrong or tort against the estate of another, with the intention of benefitting his own estate, the law will, at the election of the party injured, *imply* or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to such wrongdoer. And when the injured party elects to waive the tort, his cause of action may be used as a set-off.

"3. *When a tort may not be waived; naked trespass.* Where one person commits a wrong or tort against another, without any intention of benefiting his own estate, and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of such wrongdoer to pay for the resulting damages; and such cause of action cannot be used as a set-off."

This decision has been repeatedly affirmed.

St. L. F. S. & W. R. R. Co. v. Chenault et al., 36 Kas. 51;

Smith v. McCarthy, 39 Kas. 308;

Frankhouser v. Neally, 54 Kas. 744;

In Smith v. McCarthy, *supra,* the first and second points of the syllabus read as follows:

"Where a person takes and sells the property of another, the owner may elect to waive the tort and sue upon the implied contract for the value of the same; and whether he has so elected, and the nature of the action brought, are to be determined by the court from the pleadings."

"In determining the effect of pleadings, they should be liberally construed with a view to substantial justice between the parties; and the pleadings herein are examined and are held to state a cause of action *ex contractu.*"

In this case, it was held that the following allegations stated a cause of action on an implied promise:

"The plaintiff avers that on the first day of October, 1885, one Jerry McCarthy, being at that time indebted to this plaintiff in the sum of nine hundred and twenty-five dollars, made, executed and

delivered to the plaintiff his certain chattel mortgage in writing, a copy of which, with all the indorsements thereon, is attached hereto, marked 'Exhibit A,' and made a part of this petition; that said chattel mortgage was forthwith, on the delivery of the same, deposited by the plaintiff in the office of the register of deeds of Atchison county, Kansas, where said chattel property was situated and the mortgagor resided; that on or about the 28th day of October, 1885, and while said chattel mortgage was in full force and effect, of record, and unpaid, the defendant, by and through her duly authorized and appointed agent, Ryan Smith, did take the fifty head of hogs mentioned and described in 'Exhibit A,' from the possession of the plaintiff mortgagor, Jerry McCarthy, without his consent, and without the consent of this plaintiff, and did convert the same to her own use and benefit; that the value of said fifty hogs was at said time, and now is, the sum of seven dollars a head, all of said hogs being of the value of three hundred and fifty dollars; that the plaintiff has duly demanded from the defendant the said hogs and all of them, which demand was refused; and that he also demanded the value of said hogs, to wit, the sum of $350, of and from defendant, which demand has been refused; that the plaintiff has a special ownership in and to said hogs to the amount of $925, being the amount of the chattel mortgage hereto attached. Wherefore, the plaintiff prays judgment against defendant for three hundred and fifty dollars, and costs of this action."

II.

We have difficulty in understanding the position of the court below with reference to these cross-petitions (Pr. tr., p. 31, term No. 180). That each of the plaintiffs in error had a claim good as against the bank, as for money had and received, must be conceded.

> Central Transportation Co. v. Pullman's Palace Car Co., 171 U. S., 138.

That such a claim was entitled to be established as a claim which was entitled to participation in the distribution of the assets must also be conceded.

> Chemical National Bank of Chicago v. Hartford Deposit Co., 161 U. S. 1.

There being claims against the bank, the plaintiffs in error could, if they chose, bring suit directly against the receiver to establish the same as claims entitled to share in all distribution.

Southern Exp. Co. v. Western N. C. R. R. Co., 99 U. S., 191;

Denton v. Baker (U. S. C. C. A., 9th Circuit), 79 Fed., 189.

Speckart et al. v. German National Bank et al., 85 Fed. 12.

While it is clear that these claims grew out of an implied contract, yet if they grew out of a tort, there is no reason existing, why they should not be paid pro rata with all other claims, or be used as a set-off to the extent that they are entitled to participate in the assets in an action of this character. While, of course, the establishment of these claims could only determine their right to receive the pro rata share in the distribution, yet to that extent they should be allowed as a set-off.

Scammon v. Kimball, 92 U. S., 362;

Carr v. Hamilton, 129 U. S., 252;

Scott v. Armstrong, 146 U. S., 499, *supra;* and cases cited;

Central Appalachian Co., et al., v. Buchanan (C. C. A. 6 Cir.) 90 Fed. Rep., 454, and cases cited.

III.

There is no conceivable view that can be taken of the facts stated in the cross-complaints which would not entitle the plaintiffs in error to a judgment against the receiver for the amount of each of their several claims, or the right to set the amount of such claims off *pro tanto* against any claim of the receiver, under the Kansas statute, *supra.*

It must be conceded that under the provisions of section 2334 revised statutes, and the decisions of this court (collated in Denton v. Baker, *supra*), that Hood, and Lantry, each, had claims against the Missouri National Bank at the time it was placed in the hands of the receiver, growing out of the admitted fraud of the bank in selling the stock it sold to them, whether they severally were, and are, stockholders, so far as the receiver is concerned, or not; or whether they be regarded as people who having been stockholders, ceased being such from the time of the attempted rescission of

their contract of purchase, or whether they be regarded as persons who purchased over issued stock, and, therefore, never were stockholders. If they never acquired any stock, owing to the fact that the transaction was *ultra vires,* or if they rescinded the contract of purchase of the stock rightfully, they each had a several claim against the bank for the amount of money which they paid for the stock, which can be enforced in this action as a counter-claim if such claims grew out of the same transaction as did the contract which the receiver is trying to enforce against each of them. On the other hand, if the receiver has the right to recover from them the assessments ordered by the comptroller, either upon the theory that they are estopped as to him, to deny the fact that they are stockholders, or that they have waived the right to deny that they are stockholders, by reason of their laches, or that after the insolvency of the bank and the appointment of the receiver it is too late, as to the receiver, to rescind the contract of purchase, or deny the fact of their being stockholders for any reason, such right of recovery would not, in any wise, interfere with the right of action on behalf of each of the plaintiffs in error against the bank on account of its fraud, as this right existed (whether plaintiffs in error knew it or not) at the time the bank was placed in the hands of the receiver. Plaintiffs in error have the right to establish these claims against the bank either by a judgment of the court, or by the allowance of the receiver, under the provisions of section 2334, revised statutes [see Denton v. Baker, *supra,* and authorities there cited], and these claims can, in such case, be used as a set-off if it be held that they do not grow out of the same transaction involved in the matters set out in the petition.

The receiver, if he can recover at all, will recover because of the contract made between the plaintiffs in error and the bank for the benefit of the creditors of the bank, by the contract of purchase of this stock from the bank. If the plaintiffs in error have the several rights to recover against the bank it is on account of their claims that grew out of the transaction of this purchase, upon which the

right of the receiver is based, and consequently, it falls within the provisions of the Kansas code relative to counter-claims.

For the convenience of the court, we have placed in the appendix copies of those portions of the National Bank Acts applicable to the case, and also some of the sections of the English Act of 25-26 Victoria, referred to.

All of which we respectfully submit.

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APPENDIX.

The following are all the sections of the Revised Statutes in reference to national banks having any application to the case under consideration:

"Sec. 5139. The capital stock of each association shall be divided into shares of $100 each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

"Sec. 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

"Sec. 5234. On becoming satisfied, as specified in section-fifty-two hundred and twenty-six and fifty-two hundred and twentys seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect

all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

"Sec. 5235. The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."

"Sec. 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Chapter 89 of Statutes 25–26, Victoria, enacted August 7, 1862, entitled "An Act for the incorporation, regulation and winding-up of trading companies and other associations," provided for the incorporation of trading associations, etc. The 18th, 23rd, 35th, 38th, 74th and 82d sections of the Act are, for the convenience of the court, here copied and set out:

18. Upon the registration of the Memorandum of Association, and of the Articles of Association in cases where articles of association are required by this Act, or by the desire of the parties to be registered, the registrar shall certify, under his hand that the company is incorporated, and in the case of a limited company, that the company is limited. The subscribers of the Memorandum of Association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an

incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up, as is hereinafter mentioned. A certificate of the incorporation of any company given by the Registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with.

23. The subscribers of the Memorandum of Association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company.

35. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in *England* or *Ireland*, by motion in any of Her Majesty's Superior Courts of Law or Equity, or by application to a Judge sitting in Chambers, or to the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in *Scotland* by summary petition to the court of Session, or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. The court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal,

in the manner directed by "The Common Law Procedure Act, 1854," shall lie.

38. In the event of a company formed under this Act being wound-up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say):

(1) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up.

(2) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member.

(3) No past member shall be liable to contribute to the assets of the company, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act.

(4) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.

(5) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the Memorandum of Association.

(6) Nothing in this Act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract.

(7) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves.

74. The term "Contributory" shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up. It shall also in all proceed-

ings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory.

82. Any application to the court for the winding-up of a company under this Act shall be by petition; it may be presented by the company, or by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately; and every order which may be made on any such petition shall operate in favor of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.

Nos. 179 and 180.

FEB 16 1901
JAMES H. McKENNEY,
Clerk.

Brf. of Sterry and Hagen for P. E.

Supreme Court of the United States

Filed Feb. 16, 1901.

October Term, 1900.

C. HOOD,
Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri,
Defendant in Error.

TERM NO. 179.
(NO. 17,601.)

C. J. LANTRY,
Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri,
Defendant in Error.

TERM NO. 180.
(NO. 17,602.)

BRIEF FOR PLAINTIFFS IN ERROR IN EACH OF THE ABOVE ENTITLED CASES.

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BRIEF FOR PLAINTIFFS IN ERROR IN EACH OF THE ABOVE ENTITLED CASES.

STATEMENT OF FACTS IN EACH OF THE ABOVE CASES.

These cases were each commenced at the same time in the United States Circuit Court for the District of Kansas by the defendant in error, as receiver, to recover the assessment ordered by the comptroller of the currency, against the shareholders of the Missouri National Bank, of Kansas City, Missouri, for an amount equal to $100 per share.

The petition in the case brought against C. Hood alleged him to be the owner of one hundred shares, the petition in the case against Lantry alleged him to be the owner of two hundred shares of the capital stock. In each case amended and supplemental answers, and cross-petitions were filed by the defendants. Each of these answers contained two separate and independent defenses, and also included a cross-petition to recover a judgment against the receiver for the amount paid to the bank for this stock at the time of its purchase by the plaintiffs in error; to each of these defenses and to each of the cross-petitions the receiver filed a general demurrer. These demurrers were, on hearing, severally sustained by the Circuit Court; no further amendments being made to the answers, judgment was finally rendered in the case against C. Hood, for the amount of the assessment claimed, to-wit: Ten Thousand Dollars ($10,000), with interest and costs, and in the case against the defendant C. J. Lantry, for the sum of Twenty Thousand Dollars ($20,000), with interest and costs.

Each of these cases were then taken upon a writ of error to the United States Circuit Court of Appeals, for the 8th circuit, and there, upon consideration, the judgment of the court below was affirmed in each case by a divided court. From these judgments of affirmance writs of error were taken to this court.

The facts stated in each of the two defenses and cross-petitions in each answer, to which the demurrers were sustained, are substantially as follows:

The Missouri National Bank of Kansas City, Missouri, was organized as a national bank in 1891, with a capital stock of $500,000, which apparently was all subscribed and paid for at the time of the organization. Early in July, 1893, this bank temporarily suspended payment. Upon its suspension the comptroller of the currency of the United States, after careful investigation into its affairs, determined that while the bank was in a sound financial condition, it should reduce its capital stock to $250,000, and that upon such reduction it would be permitted to continue its business

as a national bank. The bank immediately reduced its capital stock to the amount required by the comptroller, and on July 26, 1893, the comptroller issued two public bulletins as follows:

"This bank (referring to the Missouri National Bank of Kansas City) suspended on the 17th inst. because of a run on the part of its depositors. There was nothing in its condition to warrant this run or occasion suspicion as to its solvency. It seems to have been prudently managed and its resources are unusually free from items of questionable value, there being no bad debts. The bank is solvent and should be permitted to resume."

"The Missouri National Bank of Kansas City, Missouri, having complied with the conditions imposed by the Comptroller of the Currency, and its capital stock being unimpaired, has this day been permitted to reopen its doors for business. The bank opens with plenty of money on hand, and is wholly solvent and safe."

The bank continued in business at Kansas City from July 26, 1893, until December 3, 1896, when it was closed by order of the comptroller, and it and its business placed in the hands of the defendant in error, as receiver.

From the time of its original organization, until it was finally placed in the hands of the receiver, in December, 1896, the bank was, as a matter of fact, absolutely insolvent, and in a wretched financial condition. Little or none of its capital stock (either as it was originally issued, or as it was left when it was reduced), was ever fully paid for, except by worthless and fictitious notes.

Prior to April 18th, 1896, the bank, through its president and cashier, sought to induce each of the plaintiffs in error (who were citizens of Kansas) to become connected with the bank, by the purchase of some of its capital stock. At the time of the negotiations with each of the plaintiffs in error, and at the time of the issuance of the certificates of stock to them, hereinafter set out, the bank was actually in an extremely bad condition, being utterly and hopelessly insolvent, on account of various reasons, including the lack of full payment in cash for its capital stock (all of which had been issued), bad loans, the withdrawal of money on fictitious notes, and other paper, and on account of other reasons, set forth

in the answers. From the commencement of its organization up to late in the fall of 1896, the officers of the bank, had so manipulated its books, and assets, as to be able to successfully conceal its actual insolvent condition from every one, including the comptroller, and his examiners.

While the bank was in this condition, the plaintiffs in error, were induced to make an investigation into its affairs, by the false and fraudulent representations of its officers, as to its perfectly solvent condition, with the view of becoming connected with it, through the purchase of some of its capital stock; they made the most careful and searching investigation, as to the actual condition of the bank, that it was possible for people situated as they were, to make.

In this examination they found, not only the very favorable reports of the bank examiners, made from time to time, but also the certificates of character, and good standing, issued by the comptroller upon the re-opening of the bank on the 26th of July, 1893, as above set out. The plaintiffs in error employed to make this examination two expert bank examiners. These examiners were deceived, as had been the government examiners, and as finally were these plaintiffs in error, through the false and fraudulent representations of the president and cashier, as to its solvency, the character of its bills receivable and other resources, and as to the extent and character of its liabilities, and the false and fraudulent concealment of the facts, made by the manner in which the books were kept, and by the fictitious and forged bills receivable, and other fraudulent practices of these officers and others set out in detail in these answers. At the very beginning of these negotiations, and from that time on, the president of the bank made to the plaintiffs in error, and to each of them, fraudulent and false representations, as to the condition of the bank, its resources and liabilities; representations that induced the plaintiffs in error, and each of them, to believe that the bank was perfectly solvent, and in the splendid condition that the

comptroller believed it to be in when he issued to the public his bulletins above set out. The records of the bank at that time disclosed that the average daily deposits amounted to $1,500,000, and that its loans, in the shape of bills receivable, averaged about $1,300,000. While each of the plaintiffs in error believed and relied upon the false and fraudulent representations of the president and cashier, they left nothing undone, that was possible for men situated as they were to do to fully acquaint themselves with the actual condition of the bank, before making the investment.

Prior to these negotiations certain stockholders of the bank, induced the bank, to purchase their stock from them, under threat to throw the stock, they wished to sell, on the market at such prices, as would create exposure of the actual condition of the bank. The bank, under these threats, during the time referred to, attempted to purchase about 800, of its outstanding shares of capital stock, and paid to the stockholders, holding the same, the prices asked, either in cash belonging to the bank, or by surrender of notes given by these stockholders, in payment of the stock sought to be purchased, or by cash and by surrender of notes, as the case might be. Each of the persons engaged in these transactions, knew that the bank was the real, actual attempted purchaser, of the stock, and that its funds, and its assets were being used in payment for the stock thus attempted to be purchased. In order to conceal the transaction, from the knowledge of the government, and everyone else the certificates for this capital stock, held by the persons of whom these attempted purchases were made, were either endorsed by such persons in blank, or assigned to the name of some employe, of the bank, and then delivered to the bank, by the persons attempting to sell. The bank, upon receipt of the certificates, would substitute the worthless notes, of insolvent employes of the bank, for the cash paid, or assets used, by the bank in such attempted purchase. None of this stock, so attempted to be purchased, was taken, or purchased, or procured by the bank, to prevent any loss or losses, upon any debt or debts, previously contracted in good faith, or

purchased in any way authorized by law, but was attempted to be purchased by the bank, with its funds, or assets, for the sole purpose of preventing such stock from being sold in open market, and to prevent the owners of it from making an investigation into the actual condition of the bank. None of the parties in whose names the certificates for the capital stock attempted to be purchased were assigned ever paid anything for the stock, neither did they, or any of them, ever intend to pay anything for the stock, or to pay any of the notes, given to the bank, to replace its funds, used in the purchase of the stock, because it was agreed between them and the executive officers of the bank, that they should hold the stock in trust for the bank, and for its sole use and benefit. When the plaintiffs in error finally determined to purchase stock of the bank, they were informed by the president of it, that the bank, held some of its own stock, taken by the bank, from debtors to prevent loss on debts, previously contracted in good faith, and that the officers of the bank, could purchase some more from friendly stockholders, who were anxious to have plaintiffs in error become stockholders in the bank. Hood thereupon, about April 18, 1896, agreed to purchase one hundred shares of this stock from the bank at par value, to-wit: $100 per share, and Lantry agreed to purchase from the bank two hundred shares of the stock at par value of $100 per share; Hood paid to the bank $10,000 in cash; Lantry paid to the bank $20,000 in cash, and each received certificates, for the number of shares of the capital stock, alleged in the respective petitions filed in the court below by the receiver, to be owned by them.

From the time the certificates of stock were issued to these plaintiffs in error and up to the time the bank went into the hands of a receiver, nothing occurred in the management of the bank, to arouse the suspicion of the plaintiffs in error, nor did they suspect anything, until the bank was actually taken possession of by the receiver on December 3, 1896. At that time the books, containing the history of the bank, and the bank's affairs, were turned over to the receiver, and *plaintiffs in error were severally denied access to*

them. They made persistent efforts, to secure all information possible about the bank's condition after the receiver was appointed, but were prevented from doing so by the receiver absolutely refusing and denying such request (Transcript p. 10), sometimes giving as an excuse assurances that the bank was solvent and would pay its debts. Not satisfied with these refusals made to them by the receiver, they made appeals to the comptroller, to permit them to investigate and ascertain the actual condition of the bank, such permission was finally granted them, about the first day of September, 1897. They at once procured the services of an expert bank examiner, who secured for them, a history of the bank, as far as it could well be done. As soon as this report was made to them by their expert, *they became aware for the first time* of the frauds that had been perpetrated upon them, and that the bank had been hopelessly insolvent since its suspension in 1893, if not from the beginning.

Immediately upon learning this, they tendered their stock back to the receiver, and demanded the return of their money paid for it to the bank or an allowance of their several claims therefor. It will thus be seen, that they had made the most careful and prudent investigation of the bank's affairs, before they attempted to purchase any stock, and when it went into the hands of a receiver, made every effort in their power, to ascertain its actual condition, and that, as soon as they became aware of the condition of the bank at the time of their purchase, they at once tendered the stock back, and rescinded the contract of purchase. The character of the frauds finally discovered, were not those, such as occur between parties, who deal with each other at arm's length, but were frauds, that had been so adroitly concealed, and covered up, that they had escaped the detection for years, of directors, stockholders, depositors, creditors—and even the vigilance, of one of the ablest comptrollers of the currency that had ever occupied that office, together with his large force of expert bank examiners, upon whom was conferred by law, not only ample power, to make full investigation, but the ab-

solute duty of guardianship over banks, like this one, for the purpose of detection of such frauds. Not only did these frauds escape the detection of the comptroller's office, but that very office, had placed a barrier in the way of their detection, by certifying to the world, that the bank was in a healthy, and prosperous condition, at a time when it was in truth rotten. After the bank went into the hands of a receiver, these frauds were not brought to light, and made known to the world, by the only person, who was clothed with the power, and charged with the duty to do so, but it was left for these defendants to secure, after many efforts, permission from the comptroller's office to investigate, and thereby learn, for the first time that which should have been disclosed willingly by the receiver to everyone interested.

On August 30, 1897, prior to obtaining permission to investigate, and while no one unless it was the comptroller, his receiver and the officers of the bank, were aware of the facts stated, the comptroller of the currency ordered an assessment of $100 per share against each shareholder. Each of the plaintiffs in error refused to pay this assessment, pending the investigation they were engaged in making, when notified.

The answer setting out in detail the facts above stated is found on pages 5 to 16 of the record in case numbered 17,602 (term No. 180), and pages 5 to 16, in case numbered 17,601 (term No. 179).

There is in each case, practically three main questions presented by the sustaining of the demurrers in the court below, and the affirmance of its ruling, by the Circuit Court of Appeals, which are as follows:

1st. Did the certificates issued by the bank to the plaintiffs in error make the plaintiffs in error shareholders of the bank liable to the assessment ordered?

2nd. Did these plaintiffs in error under the admitted facts have the right to rescind their contract of purchase of this stock at the time when they attempted to do so, and relieve themselves from the liability of the assessment ordered?

3rd. Had the plaintiffs in error the right to present their claims against the receiver, for the money paid to the bank at the time of their attempted purchase of this stock in a cross-petition filed in these causes of action commenced by the receiver to recover these assessments?

ASSIGNMENT OF ERRORS IN CASE NO. 17,601.

(Title of cause omitted.)

1st. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as receiver, to the first defense contained in the amended and substituted answer of defendant therein, C. Hood.

2nd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the second defense stated and set forth in the amended and substituted answer of defendant therein, C. Hood.

3rd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in favor of plaintiff, T. B. Wallsce, as such receiver, against the defendant, C. Hood, upon the sustaining of said demurrer to the defenses contained in said amended and substituted answer of defendant, C. Hood.

4th. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the cross-petition in the answer in said cause contained.

Wherefore, the defendant, C. Hood, prays that the judgment of said court heretofore rendered against him be set aside and held for naught, and that he be restored to all things which he has lost by the rendition of such judgment.

ASSIGNMENT OF ERRORS IN CASE NO. 17,602.

(Title of cause omitted.)

1st. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as receiver, to the first defense contained in the amended and substituted answer of defendant therein, C. J. Lantry.

2nd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the second defense stated and set forth in the amended and substituted answer of defendant therein, C. J. Lantry.

3rd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in favor of plaintiff, T. B. Wallace, as such receiver, against the defendant, C. J. Lantry, upon the sustaining of said demurrer to the defenses contained in said amended and substituted answer of defendant, C. J. Lantry.

4th. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the cross-petition in the answer in said cause contained.

Wherefore, the defendant, C. J. Lantry, prays that the judgment of said court heretofore rendered against him be set aside and held for naught, and that he be restored to all things which he has lost by the rendition of such judgment.

POINTS AND AUTHORITIES.

FIRST POINT.

The Circuit Court erred, in sustaining the demurrer to the second defense, in each answer, as the facts admitted by the demurrer in each of these defenses clearly established the proposition, that neither one of the plaintiffs in error, were shareholders of the Missouri National Bank, at the time of the levy, of the assessments, sought to be collected in these actions.

I.

We briefly re-state the facts upon which this defense, in each case, is based:

The bank, having all of its capital stock outstanding, attempted, through its officers, to purchase 800 shares of such stock, from some of its shareholders, to prevent a threatened exposure, of its actual insolvent condition, by the parties holding such shares of stock. To carry out this scheme, the officers of the bank, took of its assets, a sufficient amount to pay for the purchase, of these 800 shares, to the holders, the prices agreed upon; and paying for the same, had the stock certificates, which had been issued therefor transferred, by the actual owners of these certificates and the stock, represented by such certificates either directly to the bank, or to some of its employes, to hold in trust for the bank. All parties to this transaction, knew that the bank was using its assets, to make this purchase, for the purpose stated, and for no other purpose, and that such purchase was being made for the bank. These transactions, between the bank and its shareholders, were

bald, open violations of Section 5201 of the Revised Statutes of the United States, to the knowledge of all concerned. Upon receiving these certificates from its shareholders, who owned them, the bank, cancelled a sufficient number of them, to enable it to deliver, without an apparent over-issue, a certificate to plaintiff in error Hood for 100 shares, and a certificate to plaintiff in error Lantry for 200 shares (see printed Transcript, case No. 17,601, pages 12 to 15, and case No. 17,602, pages 12 to 15).

II.

That this attempted purchase of a portion of its own capital stock by the bank for the purpose admitted in violation of the statute, was *void* and not merely *voidable*, seems no longer to be an open question in this court, under the principles determined by it in the cases of:

Johnston v. Taffin, 103 U. S. 800;
California Bank v. Kennedy, 167 U. S., 362;
First National Bank of Concord v. Hawkins, 174 U. S., 364.

On the 28th of October, 1899, the Court below in following the decision of this Court, in California Bank v. Kennedy, *supra*, in the case of Schofield v. Goodrich Bros. Banking Co. (98 Fed. 271), held that:

"The purchase by a corporation, only empowered by its charter to transact a banking business, of the stock of another corporation, as an investment, and not as security or in payment of a debt, is *ultra vires* and void, and cannot be validated by estoppel. Hence such a corporation cannot be held liable for an assessment as a stockholder of a national bank, where it purchased the stock as an investment, although it retained such stock until the national bank became insolvent, and received dividends thereon."

Notwithstanding this decision, and in direct opposition to the principles determined by it, the court below, two days after it was rendered, in determining the case at bar, held in substance: That a national bank, having attempted, in direct violation of the pro-

visions of Section 5201 of the Revised Statutes, to purchase some of its own outstanding capital stock, could, by selling the same, to an innocent purchaser, under fraudulent representations, create by such a transaction, as against such innocent purchaser, an estoppel, which would prevent such purchaser, from denying the fact, that the bank had acquired title to this stock, sufficient to transfer it, provided the bank through such sale, was enabled to replace that portion of its assets, used in the purchase of the stock, by the money fraudulently obtained from the purchaser. It must be admitted that one of these decisions of the court below is wrong.

III.

The certificates, which were transferred to the bank, upon its attempted purchase of these 800 shares of stock, did not vest in the bank, either the possession of the stock, or the title to a single one of the shares, represented by such certificates.

The certificates, *not being the stock itself*, but merely evidence of the ownership of the stock represented by them, could not, upon delivery to the bank, in direct violation of the provisions of the statute, divest the people transferring them, of their title to the stock, evidenced by such certificates, and invest the bank with title.

Mr. Cook, in his work on Stock, Stockholders and Corporation Law (2nd ed.), paragraph 10, states the legal character of certificates of stock in corporations as follows:

"Certificate of Stock:—A certificate of stock is, from one point of view, a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the shareholder in the corporate property and franchises; it operates to transfer nothing from the corporation to the shareholder, but merely affords to the latter evidence of his rights. It should be clearly apprehended that the certificate is not the stock, but merely written evidence of the ownership of shares. Accordingly, it follows that shares have no 'ear marks'—that one share cannot be distinguished from another share—but that it is only the certificates which are distinguishable one from the other

by their numbers and in other ways. The certificate, therefore, has value in itself only as evidence, and apart from the shares which it represents, it is utterly worthless. And even as evidence, it is not in every case essential; it is merely a convenient voucher, which the shareholder has a right to receive if he asks for it. One element of its value to the shareholder is that it is prima facie evidence of his title."

Judge Thompson, in his recent work on Corporations, volume 2, section 2348, states the proposition as follows:

(The italics are ours.)

"And, first, it is to be observed that such a certificate is merely the paper representative of an incorporeal right, and that it stands on a similar footing to that of other muniments of title. It is not in itself *property*, but is merely the *symbol* or paper evidence of property. Hence, the proprietary right may exist without the certificate. Numerous cases accordingly hold that a person may acquire the rights and incur the liabilities of a shareholder, both to the corporation and to its creditors, although no certificate has, in fact been issued. Corporate shares have also been classed as 'securities.' And although they may be thus designated within the meaning of particular statutes, yet it is plain that they are not securities in the proper sense of the word. 'Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation in which he is a member.' The following further observations in the same line of thought were made by Mr. Justice Crockett: 'If a firm doing business as an ordinary partnership issue certificates to each of its members, specifying the interests of the respective co-partners, such certificates would have no intrinsic value, except as evidence of the *quantum* of interest of each co-partner. The joint interest of the co-partner in the property and business of the firm is the substance of the existence of which the certificate is but the evidence. If, for example, there be three co-partners, each owning an undivided interest of one-third, there is no appreciable difference between the respective interests. They are in all respects precisely similar, and each several interest is an exact duplicate of the others. The same principle is applicable to corporations. The holder of ten shares of stock stands precisely upon the same footing as any other holder of ten shares. Their interests are precisely similar and of the same value, and each holds but an undivided interest in the common property.' From the principle that the certificate is not the property itself, but merely the muniment of title, it has been held

that the duties, privileges and responsibilities of the holder of it cannot be divested by the mere act of writing across the face of it the word 'cancelled,' and returning it to the secretary of the company. As a certificate is not necessary to make one a shareholder, *so the surrender of it to the company does not necessarily make the holder of it cease to be a shareholder.*"

That this court is in full accord with the doctrine of the text quoted, is shown by the following quotation from Justice Bradley's opinion in the case of Bank v. Eaton, (141 U. S., 227):

"A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself."

See also:

Hammond & Co. v. Hastings, 134 U. S., 401;

Johnston v. Laflin, 103 U. S., 800;

National Bank v. Watsontown Bank, 105 U. S. 223.

The case of Burrows v. Niblack, decided by the Circuit Court of Appeals of the 7th circuit (84 Fed. 111), is precisely in point. This case was an action brought by the receiver of the Chemical National Bank of Chicago, to recover from Burrows $10,000 paid to him, by that bank for a hundred shares of its own outstanding capital stock, attempted to be purchased from Burrows, while it was a going concern. We quote from the opinion in this case, illustrative of the point in question, as follows:

(The italics are ours.)

"The principal objections urged are: (1) That the validity of the purchase by the bank of its own stock can be questioned only by the government; (2) That the alleged liability of the bank for the return of the money can be enforced only in a court of equity; and, (3) That a tender back of the shares of stock purchased, was essential to the right of recovery of the price paid. The first objection is based upon that line of decisions of which illustrations are found in Bank v. Matthews, 98 U. S., 621; Bank v. Whitney, 103 U. S., 99; and Thompson v. Bank, 146 U. S., 240, 13 Sup. Ct., 66; but the present case, as we think, is governed rather by the principles declared in McCormick v. Bank, 165 U. S., 538; 17 Sup. Ct., 433; and Bank v. Kennedy, 167 U. S., 362; 17 Sup. Ct., 831, where the line of cases mentioned is distinguished. The transaction

here in question was not a purchase made for the purpose of preventing, or which was necessary to prevent, loss upon a debt previously contracted, but as set forth, it was a bald purchase by the bank of its own stock for cash, and necessarily involved for the time being a reduction *pro tanto* of the corporate stock. Even if it were not forbidden by the statute, the transaction would be inconsistent with public policy and with established principles of law. The suggestion that a reduction of stock by a national bank may be lawfully made under section 5143 of the revised statutes is irrelevant because it is not shown, and without proof it is not to be presumed, even if it were conceivably possible, that this transaction could have been justified under the provisions of that section. The purchase was outside of and beyond the powers of the bank, and therefore, as a corporate act, was void from the beginning; and, while it appears from the agreement that the certificates of stock were endorsed in blank and delivered to the president of the bank, *the latter did not thereby acquire, nor the plaintiff in error part with, title to the stock.* The money having been unlawfully paid out, the bank had an immediate right of action to recover it in an action of assumpsit. *It was not necessary to go into equity nor to offer a return of stock.*"

This court has practically held, that in such case it is not necessary to make any tender or demand.

Pence v. Langdon, 99 U. S., 578.

IV.

The shareholders, from whom these 800 shares of the bank's capital stock, was attempted to be purchased by the bank, remained, after the transfer of the certificates to the bank, or its employes, just as much, the owners of the stock, attempted to be transferred, as they were prior to such attempted transfer.

The persons attempting to sell this stock to the bank were the persons, whom the receiver, should have called upon to pay these assessments, instead of calling upon the plaintiffs in error. It has been constantly held, by the Federal Courts (including this court) that the real owner, of the shares of capital stock, of an insolvent corporation, is the party who should be held liable, for the assessment, where an assessment of stockholders for the benefit of creditors is authorized.

Pauly v. State Loan and Trust Co., 165 U. S. 606, and cases therein cited;
Anderson v. Warehouse Co., 111 U. S., 479;
Johnston v. Laflin, *supra*;
Whitney v. Butler, 118 U. S., 655;
Stuart v. Hayden, 169 U. S., 1;

V.

The two certificates issued to Hood, and Lantry, purporting to convey one, and two hundred, shares of the capital stock of this bank, were each for an actual over-issue of stock, and hence did not, make either Hood, or Lantry, a shareholder in this bank. In support of this proposition, we quote from the text of Cook on Stockholders, etc. (4th Ed., Par. 292):

"By over-issued stock is to be understood stock issued in excess of the amount limited and prescribed by the act of incorporation. Certificates of stock issued in excess of the certificates that represent the full authorized capital stock of the corporation represents over-issued stock. Such stock is spurious and wholly void. This is the settled law, and it prevails equally whether the over-issue is the result of accident or mistake, or want of knowledge of the law, or is due to fraud and intentional wrong-doing. The *animus* or intent of the parties to the over-issue is not material. Over-issued stock, no matter how over-issued, represents nothing, and is wholly and entirely valueless and void. So rigid and well established is this rule that not even a *bona fide* holder of such stock can give to it any validity or vitality."

The leading case upon this subject is that of New York, etc., R. R. Co. v. Schuyler, 34 N. Y., 30, which fully supports the text above quoted.

If these certificates, represented nothing but over-issued stock, then under the decision of this court, (Scovill v. Thayer, 105 U. S. 143), neither Hood, or Lantry, acquired any rights, as stockholders in this bank, or assumed any liability, for the assessments in controversy. We believe that the rule laid down by this court

in Scovill v. Thayer, has now become the settled doctrine of all the courts.

See the decision of the court, below, in the case of Lared Improvement Co. et al. v. Stevenson (66 Fed., 633); and each of the following cases:

Kampmann v. Tarver (S. C. of Tex.), 29 S. W., 768;
Kellerman v. Maier, et al., 116 Cal., 416;
Christenson v. Eno, 106 N. Y., 97;
Andrews et al., v. National Foundry & Pipe Works, 22 U. S., C. C. A. Rep., 110;
Gillman v. Gross (S. C., Wis.), 72 N. W. R., 885;
Tschumi v. Hills (C. A., Kas.), 51 Pac. 619;
Stevens v. Follett, 43 Fed. Rep., 842.
See also other authorities cited on pages 22 and 23.

In view of the law as determined by the above decisions, it seems to us that the reasoning of the court below, upon this proposition was unsound (see printed transcript, pages 29 to 39). The court below admits, that the transaction between the bank and its shareholders, in the attempted purchase of this stock, was *ultra vires*, but then proceeds to argue, that because the bank fraudulently took the money, of plaintiffs in error, and thereby restored its impaired assets, to that extent, the plaintiffs in error, were in no position, to take advantage of this transaction, for the purpose of relieving themselves, of the liability to an assessment, as by the transaction each of the plaintiffs in error became invested with the legal title of all the stock purported to be represented by the certificates. In other words, the court held: That the law imposed upon each of plaintiffs in error, a penalty, for the sole reason, that the bank, had been able to defraud each of them, in a case, where neither one of the plaintiffs in error, were guilty of any laches, holding further: that, this penalty, was imposed for the sole benefit of persons, who

would have received precisely the same benefit, if the assessment had been levied against the real owners of the stock, who had attempted fraudulently to rid themselves of such burden.

The court also held, that only the government, had the right to inquire into such transactions although the transactions were prohibited both by the statute, and by public policy, overlooking the principles, determined by this court in its recent decisions in McCormick v. Market Nat. Bank (165 U. S., 538); California National Bank v. Kennedy, *supra*; First National Bank of Concord v. Hawkins, *supra*, and its own decision made only two days prior to the decision in the case of Scofield v. Goodrich Brothers Banking Co., *supra*.

The majority of the court below, also overlooked the fact, that the transfer of the certificates, to the bank, was not the transfer of the stock itself, and overlooking this, assumed that the shares of stock, attempted to be sold to the bank, were themselves, in some way, transferred to the bank, and by the bank transferred to each of the plaintiffs in error. This will be seen by reading the opinion of Justice Thayer, from which we quote the following paragraph: (The italics are ours.)

"The creditors of the bank who must be presumed to have extended credit on the security afforded by the capital stock and the statutory liability incident thereto, cannot be deprived of such security, either by the fact that the defendant was fraudulently induced to become a shareholder or by the further fact *that the bank had wrongfully acquired the stock which it subsequently sold to him*, when it appears that he knowingly became a registered shareholder, and remained such, for eight months, and until insolvency supervened and in the meantime enjoyed all the rights and privileges incident to that relation."

That this position of the court is untenable, must, upon consideration be apparent. Precisely the same argument was made in this Court in Schofield v. Thayer, to hold Thayer liable, to an assessment upon the over-issued stock purchased by him, but this court refused, to follow the argument, holding on the contrary that

Thayer, in permitting himself to be held out, as the owner of such stock, by its being registered, in voting it at meetings of the stockholders, etc., could not estop him, as the act was of that *ultra vires* character which would prevent an estoppel. All will concede, that if the capital stock, was all outstanding and no portion of it owned by the bank at the time of the issuance of the certificates, to the plaintiffs in error, that such certificates only represented over-issued stock, which under the decisions cited, would be absolutely void. The fact that Hood and Lantry for eight months severally acted as shareholders on the faith of such certificates being valid could give no validity to such certificates.

Can it be possible, that because of the fact, that prior to the issue of the two certificates, to the plaintiffs in error, the bank had attempted to purchase 800 shares of its capital stock in express violation of the statute, and had cancelled the certificates assigned to it to the amount of the shares, attempted to be transferred to plaintiffs in error, the certificates in question, were of any more validity, than they would have been, if at the time of their issuance, the bank had not made these attempted purchases, and all of its capital stock appeared to be (as it actually was) outstanding, upon the books of the bank?

If the position of the court below be correct, that the bank got actual possession of these 800 shares of capital stock as tangible things, through its transaction, and actually sold, and delivered 300 of these 800 shares to the plaintiffs in error, it would not follow that the plaintiffs in error, became shareholders, because it must be conceded, that the bank never got any title to any one, of these 800 shares; that neither it, or its receiver, would, under the decisions of this court, be estopped to say in any litigation whatever, that it did not acquire the title to a single share of this total of 800 shares.

Hence it follows that plaintiffs in error, by their purchase from the bank, got nothing, and should be no more estopped to say

that they did not acquire anything than their assignor, or its receiver, would be estopped to say, the same thing, if upon a distribution of assets by the receiver, after paying the debts, the plaintiffs in error claimed some part thereof as shareholders. If the receiver, had sued some of the shareholders, who transferred their certificates to the bank, to recover from them the assessment made against such transferred stock, could such shareholders have successfully defended, upon the ground, that although the transaction, between them, and the bank, was void, yet the bank was not injured thereby, having sold to the plaintiffs in error, the same shares of stock, and that the plaintiffs in error were the ones liable to such assessment, instead of themselves? We think it surely must be the law, that the receiver, could recover a judgment against any one or all of the parties, who attempted to transfer this stock, for the assessment of such stock. If this view be correct, would any court hold, that the plaintiffs in error would also be liable, for an assessment upon the same stock? No creditor has the right to ask for an assessment of any number of shares. of capital stock, of an insolvent national bank, beyond the number actually authorized to be issued, or which may have been issued through some attempted compliance with an authorization therefor.

VII.

That the doctrine of estoppel as applied by the court below, has no application, to one holding over-issued shares of stock, is, as it seems to us, thoroughly settled by the decisions of this court in Scovill v. Thayer, Bank v. Kennedy and Bank v. Hawkins, *supra*.

We had supposed until this decision was made that this point was thoroughly settled by the court below, in a decision rendered by it on March 4, 1895, in the case of Laredo Imp. Co. et al. v. Stevenson (66 Fed. 633), until it rendered its decision in the case at bar. We quote from the opinion in that case as follows:

"Is the defendant estopped by the fact that he once voted his stock, and that the officers of the corporation represented that its capital had been increased to $1,200,000, from asserting against the creditors of the corporation, that the stock issued to him was void? This question must be answered in the negative. Where a corporation has power to issue stock or to increase its capital stock, and this power is defectively or informally exercised, the acts and acquiescence of the stockholder may estop him from denying the validity of the stock or his liability therefor. Upton v. Tribilcock, 91 U. S. 45; Chubb v. Upton, 95 U. S. 665; Pullman v. Upton, 96 U. S. 328; Hadley v. Stutz, 139 U. S. 417, 425, 11 Sup. Ct. 530; Veeder v. Mudgett, 95 N. Y. 295, 310. But where the corporation is absolutely without power to issue the stock, or to increase the capital stock above a certain limit, no act or consent of the stockholder who receives stock issued without authority can estop him from denying the validity of the stock, or his liability therefor. The holder of such stock is under no obligation to pay for it, because he has received no consideration for such an obligation. The stock issued to him is absolutely void. He is not estopped to deny its validity, as against a creditor of the corporation, for the foundation of estoppel is deceit, and the creditor cannot be deceived as to the power of a corporation to issue such stock. He is bound to examine and know the law which limits the powers of the corporation with which he deals, and, whether he examines it or not, he is charged by the law with the knowledge of it: Scovill v. Thayer, 105 U. S. 143, 149; American Tube Works v. Boston Mach. Co., 139 Mass. 5, 29 N. E. 63; Reed v. Machine Co., 141 Mass. 454, 5 N. E. 852; Lathrop v. Kneeland, 46 Barb., 432; Merrill v. Gamble, 46 Iowa, 615; Merrill v. Reaver, 50 Iowa, 404; Clark v. Turner, 73 Ga., 1; Lincoln v. Express Co. (La.) 12 South, 937."

That the decisions of this court upon this question, have been quite generally followed, see

Chemical Natl. Bank of New York v. Cal. Natl. Bank, 120 Cal. 601;

Kellerman v. Maier, et al., 116 Cal., 416;

Christenson v. Eno, 106 N. Y., 97;

Andrews, et al., v. Natl. Foundry and Pipe Works, 22 U. S. C. C. A., 110;

Gillman v. Gross, (Wis.), 72 N. W., 885;

Kampmann v. Tarver (Tex. S. C.), 29 S. W. R., 768;

Winters v. Armstrong, Fed. 37 509;

Hayden v. Charter Oak Driving Park, 63 Conn. 142;

Page v. Austin, 10 Can. Sup. Ct. 132;

Clark v. Turna, 73 Ga., 1;

Insurance Co. v. Kamper, 73 Ala., 325;

Veeder v. Mudgett, 95 N. Y., 295:

Mallory, et al. v. Hananer Oil Works (S. C. Tenn.), 8 S. W. Rep. 396.

SECOND POINT.

The court below erred in sustaining the ruling of the Circuit Court upon the demurrer to the first defense in each answer.

FIRST.

The appointment of a receiver for this bank, and the making of the assessment ordered by the comptroller, did not limit or destroy, the right of either of the plaintiffs in error, to disaffirm their contract for the purchase of the shares of stock, under the admitted facts stated in each of the defenses.

I.

Preliminary to the discussion of the proposition stated we recall the court's attention to the following facts, to wit:

The plaintiffs in error, at the time when these actions were brought, were still in utter ignorance of the actual condition of the Missouri National Bank of Kansas City. While at that time they had the several right to assume, that each of them, had been induced to purchase this stock, from the bank, through fraudulent representations made by it, owing to its then inexplainable insolvency, yet the receiver, by his persistent refusal to permit them, to investigate the books, and other records of the bank, prevented their ascertainment of the actual facts in the case, which they believed would possibly make for each of them a defense. Subsequently, in September, when they finally obtained permission from the comptroller, to make an investigation, the first find they made, in such investigation, was the fact of the utter insolvency of the bank, from the time it commenced business, until the time its doors were finally closed; such fact at once disclosed, for the first time, to them, that the representations made, to induce the pur-

chase of stock were false and fraudulent, and entitled them to generally rescind their contracts of purchase, which they at once did, and then plead the facts, concerning the fraud, and their rescission, in their answers, before the subsequent discovery, that the bank had no stock to sell. Subsequently, after the filing of the first answers, setting out these defenses, the further investigation by their experts into the affairs of the bank revealed the fact that the bank did not own any stock at the time of its attempted sale of three hundred shares to them. Upon the ascertainment of this further fact, the present answer was filed, containing each of these second defenses, as additional to those already filed. These parties, and their counsel, yet feel that, under the uncertainties of the situation, induced by the fraudulent system of keeping the books and accounts, of the bank, each of these defenses should be maintained, to meet any possible proof, that may be made by the receiver, or the facts which may be developed on the trial. While each one of these defenses, is distinctive from the other, each one is to some extent, interwoven with the other. The first defense sets out at length the sale to the plaintiff in error, Hood, of one hundred shares of stock, and to the plaintiff in error, Lantry, of two hundred shares of the capital stock of this bank, by the bank, under such fraudulent representations as would, without question, so far as the bank was concerned, entitle Hood, and Lantry, to severally rescind the contracts of purchase, and recover from the bank the price paid, at the time when the rescission was made.

These sales were made April 18, 1896, and the bank was put in charge of the receiver December 3, 1896. The receiver, upon taking charge of the bank, entered into and retained possession of all of its property, including the rooms and furniture, where it did business, and the executive officers of the bank, left the state of Missouri, prior to the discovery of the fraud, by the plaintiffs in error.

Plaintiffs in error, upon ascertaining the fraud practiced *at once* tendered to the receiver the certificates of stock, which had

been issued to them, and demanded of him the repayment of the money paid by them to the bank for such stock. The receiver was at that time in sole possession of the bank, its rooms, and its assets, and he was the only one who could allow, at that time, these claims, as claims, entitled to participate in the distribution of such assets as he might thereafter distribute to creditors.

II.

Under the Kansas Code of Civil Procedure as construed by the Supreme Court of that state, the rule of the common law, with reference to the construction of pleadings demurred to, does not obtain; but on the contrary the rule in force, in that jurisdiction, is, that not only every fact stated, or attempted to be stated, (however defectively) in pleadings, must, as against a demurrer, be construed, not only most favorably to the pleader, but only those presumptions, which are in favor of the pleader, (arising from the facts plead,) can be considered by the court in construing such pleadings.

Stewart v. Balderson, 10 Kas. 148;
Crowther v. Elliott, 7 Kas. 235;
Stringfellow v. Alderson, 12 Kas. 112;
McPherson v. Kingsbaker, 22 Kas. 646;
State v. School District, 34 Kas. 241;
Street Railway Co. v. Stone, 54 Kas. 83;

Section 914 of the Revised Statutes of the United States, requires the adoption of this rule, by the Circuit Court, of the United States, for that district, in all common law cases, where it would be applicable.

Glenn v. Sumner, 132 U. S., 152;
Roberts v. Lewis, 144 U. S., 653;
Central Transportation Co. v. Pullman Palace Car Co., 139 U. S., 24.

Construing the allegations, in each of these defenses, against the general demurrers, filed to them, under either the rule of the

common law, or the Kansas rule, it would be difficult to conceive of a more startling case of fraud, than that, which was perpetrated, upon each of the plaintiffs in error, by the bank itself, and which admittedly, induced their several purchase of the 200 and 100 shares of its capital stock. It would also be hard to conceive of a case, wherein parties to such a transaction would be less liable to a charge of laches on their part, preceding an attempted rescission, than are the plaintiffs in error in this case.

It will be admitted by all, that the discovery of this fraud, at any time prior, to the appointment of the receiver, would have given to each of the plaintiffs in error, the instant right, to rescind their several contracts of purchase, regardless of any question of solvency, or insolvency, of the bank at the time of the rescission.

Smith v. Reese River Mining Co., Law Reps., 2 E. Q. 264;

Venezuela Co. v. Kisch, Law Rep. 2 H. L., 99;

In re Brinsmead & Sons, 67 Law J., Ch. 11, 1 Ch. 104, 77 Law, 7 (N. S. 521);

Motor Co. v. Parnell, 75 Md., 113;

Tyler v. Savage, 143 U. S., 79;

Barens et al., v. Gates (C. C. A., 4th Ct.), 89 Fed., 783.

It must be admitted, that prior to the discovery of the fraud, which had been perpetrated, upon the investigation permitted by the comptroller, neither one of the plaintiffs in error, had been guilty of any laches, such as would preclude the right, as between themselves, and the bank, to rescind the contracts of purchase.

II.

The tender to the receiver, and the demand upon him, accomplished a rescission *in pais*.

Biglow on Frauds, 75, 415.

The officers of the bank, having through their fault, necessitated the appointment of a receiver, into whose hands the bank, and

all of its property passed, prevented by their own acts, a tender back, and notice of rescission, in behalf of the plaintiffs in error, to any officer of the bank, other than the receiver, and especially is this so, in view of the fact, that these officers, had left the State of Missouri, at the time when the fraud was discovered. While the bank as a corporation still existed, it was rendered incapable of acting in any manner, relative to any of its assets by the appointment of the receiver.

Hammond v. Pennock, 61 N. Y., 145;
Guckenheimer v. Angevine, 81 N. Y., 394;
Masson v. Bovet, Den. (N. Y.), 69; this is a leading case.

The receiver, upon his appointment, became the representative, both of the creditors, and of the bank, and the only representative of the bank.

Kennedy v. Gibson, et al., 8 Wall. 498;
Robinson v. Dickey et al., 14 Tex. Civ. App., 70.

III.

The right of one, who by fraud, has been induced to purchase, from a national bank, shares of its capital stock, to rescind such purchase, and thereby release himself, from the liability imposed by the statute, is based upon the proposition, that the liability of a shareholder, in a national bank, under the provisions of Section 5151 R. S., is, in most cases, voluntarily assumed, by the contract of purchase, and, therefore, in such cases, at least contractual in its nature, standing or falling, with the contract creating it.

The failure on the part of the court below, to recognize, that the obligations, sought to be enforced in these cases, were liabilities created by contracts, and not pure statutory liabilities, or penalties, is, we believe, the chief cause, for the decision complained of. (See its decision previously made upon this point in Scott v. Latimer, 89 Fed., 843, which controlled this case.) This court has many times, in cases arising under the National Banking Act, and also in cases arising under statutes, creating liabilities on the part

of stockholders, of a corporation, similar to that created by Section 5151 of the Revised Statutes, held that such a liability, was one growing out of contract, and not a mere statutory liability, or penalty. As was recently said by Justice White, in delivering the opinion to the court, in Matteson v. Dent, (176 U. S. 521):

"The obligation of a subscriber to stock to contribute to the amount of his subscription for the purpose of the payment of debts is contractual, and arises from the subscription to the stock. * * * The obligation to respond is engendered by and relates to the contract from which it arises. * * * The question was settled in Richmond v. Irons, 121 U. S., 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788, where the court said (pp. 55, 56, L. ed. p. 873, Sup. Ct. Rep. p. 801):

"'Under that (the national banking) act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings, and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder.'"

Justice Harlan, in delivering the opinion of this court, in the case of Stewart v. Hayden, (169 U. S. 1), uses the following language:

"This court has said that 'the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholders."

See also to same point in another national bank case:

Richmond, et al. v. Irons, et al., 121 U. S. 27.

See following decisions of this court upon similar State statutes:

Hawthorne v. Calef, 2 Wall., 10;

Flash et al v. Conn, 129 U. S., 371;

Whitman v. National Bank of Oxford, 176 U. S. 559.

In this last case, there is quite an exhaustive review, of the authorities, on the question.

While every person, who becomes a creditor, of a national bank, has the right, to rely upon the fact, that if the bank, should become insolvent, while he remains a creditor, its registered shareholders, would *prima facie* be liable to an assessment, equal to the amount, of the outstanding capital stock, held by them, yet one giving credit, to a national bank, has no right to rely upon the proposition *that any one individual shareholder, will remain such shareholder* (subject to the liability of the statute) *for any period of time*, however much such person's connection with the bank may have influenced the credit given; neither has such a person the right to *conclusively* presume, that the names of those appearing on the list, of registered shareholders, upon the insolvency of a national bank, are all rightfully there.

Pauly v. State Loan & Trust Co., 165 U. S., 606;

Whitney v. Butler, 118 U. S., 655;

Stuart v. Hayden, *supra*.

Every creditor, or proposed creditor, of a national bank, is charged with the knowledge, that every shareholder, of such bank, can cease to be a shareholder, and relieve himself, from the liability, assumed by the ownership of some of its shares, at any time, either by the transfer in good faith, on the registry of the bank, of his shares of stock, to some one else, or by rescission of the contract, which created him a shareholder, when the right of rescission exists. To presume, therefore, (as did the court below) from the facts stated in each of these defenses, that during the connection of the plaintiffs in error, with the bank, their names obtained for it credit, it otherwise, would not have had, not only ignores the Kansas rule referred to, concerning presumptions, arising from plead-

ings demurred to, but adds no argument against the right of each of the plaintiffs in error, to rescind the contract, at the point of time, each did rescind. This several right on their part, to rescind their several contracts of purchase, *was created by the principles of equity and of the common law, and not by force of any statute.* There being no statute giving the right to rescind, under facts such as are stated in these defenses, or under any state of facts for that matter, or fixing the time, within which such rescission should be made, the time, of the exercise of such right, is only limited, and controlled, by the requirements of the rule in equity and at common law, which created it. The only limitation imposed by equity or the common law, as to the time when the right of rescission must be exercised, in this class of cases, is, that it must be exercised, within a promptly reasonable time after discovery, (by the party injured), of the fraud creating such right. In the case at bar, the rights of Hood and Lantry, can be fully protected in this action at law, and hence they were not required to proceed in a court of equity, to cancel the certificates severally issued to them, as a court of equity would have had no jurisdiction of such an action.

Buzard et al. v. Houston, 119 U. S., 347;

Ins. Co. v. Bailey, 13 Wall., 616;

Grand Chute v. Winegar, 15 Wall., 373;

White v. Boyce, 21 Fed., 228;

Thompson on Corp., vol. 2, sec. 1424, *et seq.*

We quote from Cook on Corporations (vol. 1, par. 152, 4th ed.) as follows:

"There are, in general, five different remedies which are open to a subscriber induced to subscribe by fraud. He may, upon discovering the fraud, rescind the subscription by notification to the corporate authorities, without taking legal proceedings; or he may wait until sued upon the subscription, and then set up the fraud as a defense to the action at law; or he may file a bill in equity to restrain such suits at law, and to set aside the subscription contract, and also, if he wishes, to recover back payments already made on the subscription; or he may bring an action at law against the par-

ties fraudulently inducing the subscription, and recover damages for the deceit; or he may sue for money had and received."

The proposition above stated, is illustrated in the analagous cases of insolvency, where there has been an assignment, or a receiver appointed, and is also illustrated, by the decisions, under most bankruptcy laws. In such cases, it has generally, (if not universally) been held, that the assignment, or the appointment of a receiver, in no way affects rights, which could be asserted against an assignor, or bankrupt, if no assignment had been made, or receiver appointed. This is well illustrated by the following decisions of this court, each of which, seems to us, very applicable, and very much in point:

Donaldson, assignee, v. Farwell, et al., 93 U. S., 631;
Yeatman v. Savings Institution, 95 U. S., 766;
Stewart v. Platt, 101 U. S., 738;
Porter v. Lazer, 109 U. S., 84.

Guided by the common law, (there being no statute), this, and other courts, have frequently held, that a receiver, of a national bank, upon his appointment, takes *all* of the assets of the bank, (including the shareholders' liability), in trust, for the creditors, and the stockholders, *subject to all claims, and defenses, that might have been interposed, against the insolvent corporation itself, with respect to any of such assets.*

Scott v. Armstrong, 146 U. S., 499;
Whitney, et al., v. Butler, 118 U. S., 655;
Lincoln v. Fitch, 42 Me., 456;
Winters v. Armstrong, 37 Fed., 509;
Cutting, Receiver, v. Damerel, 88 N. Y., 411;
Hayes v. Shoemaker, 39 Fed., 319;
Young v. McKay, 50 Fed., 394;
Snyder v. Foster, 73 Fed., 136.

As stated by this court in the head-notes to the case of Scott v. Armstrong, *supra*:

"The receiver in such case takes the assets in trust for the creditors, and, in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed against the insolvent corporation."

See also:

Fourth Street Bank v. Yardley, 165 U. S., 653;

Yardley v. Philler, 167 U. S., 360;

Earl v. Commonwealth of Penn., 178 U. S. 449.

The proposition as stated in Winters v. Armstrong, (37 Fed. 508) in reference to the question here discussed by the late Justice Jackson is as follows:

"The receiver stands in the shoes of the bank and can assert no rights against the subscribers which the bank could not have asserted."

As was said by the Supreme Court of Maine, in the case of Lincoln v. Fitch, *supra*:

"The receivers of a bank, appointed to close its concerns, have no rights superior to those which the bank would have had if its management had remained in the hands of the directors; and the liabilities of third parties to the bank are not increased or otherwise varied by the appointment of receivers."

See also upon precisely the same point:

Cutting v. Damerel, 88 N. Y., 410;

Farley v. Lincoln, 51 N. H., 577;

Bussing v. Rice, 2 Cush., 48;

Wallace et al., v. Cohen et al., (N. C.) 15, S. E. 892.

One of the most important assets, that is vested in a receiver of a national bank, is the liability of the shareholders, of such bank, to respond, to an amount equal, to the face value of the shares of capital stock, held by them. It is hard to perceive upon what theory a shareholder, might prevent the enforcement of any other liability by a receiver of a bank growing out of a contract made with the bank while it was a going concern, on the ground that such contract, was induced by the fraud of the bank, and yet

The same principle was decided January 3, 1901 by Sup. Ct. of Errors of Conn., in New Haven Trust Company v. Nelson, Atl. Rep. Vol. 47, 7

not have the right, to make the same defense, against his liability as a stockholder, in a case, where he was induced to become a shareholder, through a contract with the bank procured by fraud, and in a case where he has not been guilty of laches, in not discovering the fraud, prior to the appointment of a receiver.

IV.

Following the principles established by the authorities above cited, it has generally been held, in the United States, where the question has arisen, that the assignment of, or the appointment of a receiver, for a corporation, on account of insolvency, does not, of itself, cut off from a stockholder in such corporation, his right to rescind his contract of subscription, or purchase of stock, induced by the fraud of the corporation if he has not been guilty of laches in asserting such right, prior to the insolvency of the corporation.

In the Eighth Circuit, until the recent decision made by the Circuit Court of Appeals of that Circuit, in the case of Scott v. Latimer, *supra*, the rule was clearly established, that the insolvency of a corporation, did not, of itself, bar the right of a subscriber to rescind a contract of subscription, or purchase of stock, induced by the fraud of the corporation, if the stockholder seeking to rescind was guilty of no laches in the matter. The earliest case touching this question, reported in that Circuit, is that of Upton v. Englehart (3 Dill., 496). This case was heard upon demurrer to a plea by Circuit Judge Dillon and District Judge Lowe; Judge Dillon, in delivering the opinion, exhaustively reviews the question of the right of a stockholder in a corporation, induced to become such by fraud to rescind his contract of subscription and purchase; and, although the case did not involve this precise question, yet the opinion, is well worth considering in this connection, as it has become a leading case, to some extent, upon questions involved in most cases of this character. This decision was followed in the same court, by decision given by the late Justice Miller, in the case of Farrar v. Walker et al., (3 Dill. 506). In this case Justice Miller, in re

viewing the question at bar, held: That a stockholder in a corporation, who had been fraudulently induced to become such, could rescind his contract, even after the appointment of an assignee for the corporation, in insolvency, provided he had exercised the diligence required by the law. This decision of Justice Miller was made October 15, 1875. In that same month, this court delivered its opinion in Upton v. Tribilcock, (91 U. S., 45). This case has been cited, both for, and against, the right of a stockholder in a corporation, to rescind his contract of subscription or purchase of corporate stock, after the insolvency of the corporation, a receiver or an assignee has been appointed. A careful reading of the opinion, must convince anyone, that, in so far as this court decided this question at all, in that case, it refused to adopt the proposition, that insolvency, and the appointment of an assignee, of itself, destroyed, the right of a stockholder, to thereafter rescind. While there was a division of the court, in this case, it is evident, that the division was only upon the question, as to whether there was sufficient evidence of fraud, and sufficient evidence of diligence in ascertaining it, to submit these questions to the jury.

The first time the question actually came up for decision in the court below, was in the case of Newbegin v. Newton National Bank, (14 U. S. C. C. A., 71; 66 Fed., 701). This case was heard before the same Justices who heard the case at bar. As the case was a *per curiam* decision, we quote the syllabi in full as follows:

"One induced to subscribe for certificates alleged to represent an increase of the capital stock of a national bank at a time when no increase had been authorized, upon false representations of the cashier as to the bank's condition and ability to pay dividends, it being, in fact, insolvent at the time, is entitled to a judgment against the bank and its receiver for the purchase money paid.

"In an action against a national bank and its receiver to recover money paid under false representations as a subscriber for an increase of capital stock, a jury being waived, the court found facts clearly entitling plaintiff to recover. It then further found that the certificates of stock were issued on July 22, 1890; that the bank had no authority to issue such certificates; that the increase of stock was

not authorized until the twenty-fourth day of September, 1890; that plaintiff was guilty of laches in not returning said certificates and demanding his money until after the bank had passed into the hands of a receiver, and in not bringing his action to recover said money sooner. The court thereupon rendered judgment for defendants. *Held*, that there was nothing in the finding sufficient to support the conclusion as to laches, and that the judgment must be reversed."

After the reversal of the judgment in the Circuit Court of Appeals, the case was re-tried in the Circuit Court. At the time of the new trial, some changes had taken place, in the status of the bank, but the question involved in that trial, was precisely the question here discussed. Upon the new trial, Newbegin obtained a judgment, which was brought again to the Circuit Court of Appeals, (20 U. S. C. C. A., 339; 74 Fed., 135), and again heard by the same Judges, who heard the case before, and they affirmed the decision of the court below, Justice Thayer delivering the opinion of the court, from which we quote at length, as follows:

"A more important question to be next considered, is whether the Circuit Court should have directed a verdict for the defendants on the ground that the insolvency of the defendant bank, occurring before the suit was filed, precluded the plaintiff from rescinding his stock subscription. It has become the settled rule in England since the decision in Oakes v. Turquand, L. R. 2 H. L., 325, 344, that a suit to rescind a stock subscription on the ground of fraud cannot be maintained by a stockholder, no matter what diligence he may have shown, after proceedings have been taken to liquidate the affairs of the corporation, on the ground of its insolvency, inasmuch as the rights of creditors of the corporation, both as against the corporation and those who are registered shareholders, then become superior to the rights of the defrauded shareholder. Stone v. Bank, C. P. Div. 282, 307; Wright's case, 7 Ch. App. 60; Kent v. Brickmaking Co., 3 Ch. App. 493; Thomp. Corp. Sections 1439, 1441; Cook Stock & Stockh., Section 163.

"In this country there are some cases in which a stockholder's right to rescind his subscription after the intervention of proceedings in bankruptcy or after the insolvency of the corporation has been denied; but, as Mr. Thompson well remarks in his Commentaries on the Law of Corporations (Sec. 1449), it does not appear in any of the cases that the denial of the right to rescind was grounded exclusively on the fact that proceedings in bankruptcy

had been instituted, or that the corporation had become insolvent. Farrar v. Walker, 3 Dill. 506, note, Fed. Cas. No. 4679; Upton v. Tribilcock, 91 U. S. 45; Ogilvie v. Insurance Co., 22 How. 381, 391; Michener v. Payson, Fed. Case No. 9525; Duffield v. Ironworks 64 Mich. 293, 31 N. Y. 310; Turner v. Insurance Co., 65 Ga. 649; Ruggles v. Brock, 6 Hun. 164; Hurd v. Kelly, 78 N. Y. 588; Howard v. Turner (Pa. Sup.) 26 Atl. 753. In all of these cases the evidence showed that there had either been some lack of diligence on the part of the stockholder in discovering the fraud of which he complained, or unreasonable delay in asserting his rights after the discovery of the fraud, or active participation in the management of the corporation, or that debts had been contracted by the corporation subsequent to the subscription, which either gave to corporate creditors superior equitable rights, or estopped the shareholders, as against a corporate creditor, from asserting that he was not a shareholder. The question whether a stockholder should be permitted to rescind his subscription, on the ground of fraud, after the insolvency of the company, is attended with much doubt and difficulty because of the peculiar relation which a shareholder sustains to the creditors of the company. In the case of Upton v. Englehart, 3 Dill. 496, 505, Fed. Case No. 16,800, Judge Dillon, while discussing the subject, pointed out that the unbending English rule above referred to was influenced in a measure by the companies act (25 and 26 Vict. C. 89), which makes provision for a 'register of stockholders' to which the public have access, and that as no similar register of stockholders is ordinarily kept in the United States, the English decisions holding that the commencement of a proceeding to wind up a company, is in itself, a bar to a suit for a rescission, are not strictly applicable to the conditions which prevail here. He concluded the discussion of the question as follows:

"'I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts, and thus drawn an innocent person into the purchase of stock—he at the time being guilty of no want of reasonable caution and judgment, and afterwards being guilty of no laches in discovering the fraud—and he thereupon, without delay, notifies the company that he repudiates the contract, and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company, subsequently happening will not enable the assignee to insist that the purchase of stock is binding upon him.'

"There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no

facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made, if the subscriber has actually participated in the management of the affairs of the corporation, if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud or in taking steps to rescind when the fraud was discovered; and, above all if any considerable amount of corporate indebtedness has been created since the subscription was made which is outstanding and unpaid—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern. There is some force, doubtless, in the view which has sometimes been taken by eminent judges that when a person has been inveigled into making a stock subscription by representations that were clearly false and fraudulent, he should be entitled to rescind his subscription, even after the insolvency of the company, under the same circumstances that would entitle him to rescind a contract of a different nature; that is to say, by proof of due diligence in discovering the fraud, and of prompt action after it was discovered. Upton v. Tribilcock, 91 U. S. 55, 56; Duffield v. Ironworks (Mich.) 31 N. W. 310, 316. See also, Improvement Co. v. Merrill, 2 U. S. App. 434, 2 C. C. A. 629, and 52 Fed. 77."

The case of the Florida Land and Improvement Company v. Merrill et al., decided in the Circuit Court of Appeals, sixth circuit, and reported in the 52 Fed. Rep. p. 77, is a case very much in point. We quote the second point of the syllabus which reads as follows:

"When bank stock is fraudulently sold, and the proceeds are turned over to the bank, and a receiver is subsequently appointed, no creditor of the bank can be said to have any such interest in the proceeds as would prevent restitution and a rescission of the sale; and such appointment of a receiver does not, in itself, show that there are creditors of the bank who have prior equities."

This case again went to the Circuit Court of Appeals and is reported in 60 Fed. Rep. 17. We quote the head notes of this decision, which reads as follows:

"An intending purchaser of bank stock is entitled to rely upon a statement of its president as to the bank's condition, without inquiring further.

"The receipt by a bank of the proceeds of a fraudulent sale of stock belonging to it, and the subsequent appointment of a receiver, give its creditors no such right in the proceeds as will prevent the purchaser from rescinding the sale and requiring restitution. 52 Fed. Rep. 77; 2 C. C. A. 629; 2 U. S. App. 434, reaffirmed."

We quote at length from the very clear and able opinion of the late Justice Jackson, in Winters v. Armstrong, *supra* (37 Fed. Rep. 509), upon this question, as follows:

"The claim made by one of the counsel for the receiver, that his position as the representative of creditors is better than that of the Fidelity National Bank, and that he can enforce rights on behalf of creditors which would not exist in favor of the association, is not sound as applied to a case like the present. When the conclusion is reached that Winters, Strange and Woods are only to be regarded and treated as subscribers for valid stock which has not been, and cannot be, issued to them by the association, the receiver cannot, in behalf of either the bank, stockholders or creditors, enforce against them any right which the association could not itself have asserted. A receiver cannot enforce the payment of subscriptions to stock which the corporation could not have enforced at the time of his appointment. Cutting v. Damerel, 88 N. Y. 410. In respect to contracts of this character the receiver occupies no position superior to that of the bank for the reason that the corporate management, while in charge of its business, just as much as a receiver after his appointment, represents the interests of all persons, creditors as well as shareholders. When the corporation is insolvent the rights of creditors in respect to the corporate assets become most prominent and a receiver appointed to administer or collect such assets is regarded as more directly the representative of creditors. In a certain class of cases a receiver may assert rights which the corporation could not, thus he may disaffirm illegal and fraudulent transfers of corporate property and may recover his funds and securities which have been misapplied. The governing officers of a corporation cannot, for example, release a stockholder or a subscriber for its stock, for his obligation to pay, to the prejudice of creditors. They cannot return to stockholders the capital stock of the corporation, which constitutes a trust fund for the benefit of creditors, to the injury of such creditors. They can make no fraudulent disposition of the corporate property for their private benefit, or for the benefit of the stockholders, leaving creditors unprovided for. These and like

transactions involving the misapplication or fraudulent disposition of corporate property a receiver may disaffirm, and recover such assets for the benefit of creditors, when the corporation might not be in a position to do so. Wood v. Downer, 3 Mason 308; Curran v. Arkansas, 15 How. 304; Burke v. Smith, 16 Wall. 390; New Albany v. Burke, 11 Wall. 96, and Sawyer v. Hoag, 17 Wall. 619, afford illustrations of the cases in which receivers may assert rights which the corporation or corporate management could not enforce. But the present case involves no such principle. Subscribers to the new stock, which they have not, and cannot obtain, are in no sense the recipients of the corporate property or assets which have been fraudulently or wrongfully divested, misapplied, or disposed of to the prejudice of creditors. The rights and obligations growing out of these subscriptions rest upon contract, and in respect to such matters the receiver stands precisely in the shoes of the association and can only enforce what it could have enforced at the date of his appointment, and is subject, so far as the assets of the bank are concerned, to the same obligations as the bank would have been under had it continued in existence and never passed into the hands of the receiver. The Fidelity National Bank could not, under the facts stated, have enforced the payment of the notes executed by Woods and Strange; neither can the receiver do so. Winters could have recovered his deposit made on his subscription as against the association, and he is entitled to its allowance as a valid claim against the assets of the bank in the hands of the receiver, so far as anything disclosed by the pleadings appears."

In the case of Beale v. Dillon, decided by the Court of Appeals of Kansas, and reported in the 47 Pac. Rep. 317, the court determines the following proposition, as appears from the head notes of the case, reading as follows:

"An assignee at law of an insolvent corporation may maintain an action against a delinquent stockholder therein to collect an unpaid subscription to the capital stock of such corporation, and in such action the stockholder may interpose the defense that he was fraudulently induced to become a subscriber to the capital stock through the false and fraudulent representations of the corporation and its officers."

This question was considered and passed upon by the United States Circuit Court of Appeals of the seventh circuit, in the case of Andrews v. National Foundry and Pipe Works, 22 C. C. A. 110, 76 Fed. Rep. 166, and the above decisions practically followed.

The position contended for was sustained by the Supreme Court of Missouri in the case of Haskell v. Worthington, 7 S. W. Rep. 481.

The same court, in the more recent case of Ramsey v. Thompson Mfg. Co. et al., 22 S. W. Rep. 719, reaffirmed this decision upon a review of all the authorities. In this last case, Justice Burgess, in delivering the opinion of the court, states the position of that court as follows:

"And while Mr. Cook says that the decided tendency of the decisions in this country is that corporate insolvency is a bar to such rescission, and the fact that the subscription was obtained by fraud and fraudulent representations, is not available as a defense in a suit against the subscriber to compel the payment of his stock, this court seems to have held otherwise in the case of Haskell v. Worthington, 94 Mo. 560, 7 S. W. Rep. 481. Brace, J., in delivering the opinion of the court in that case, which was an action by the assignee of a corporation upon a subscription to its capital stock, to recover the par value of the shares for which the defendant had subscribed, held that, as the assignee stood in the shoes of the corporation, it was a good defense to show that the corporation had entered into actual business with less capital stock subscribed than having by his conduct estopped himself from setting up the defense: that the assignee occupied no better position than the corporation did."

See also:

Whitney et al., v. Butler, 118 U. S., 655.

We quote at length from the opinion of Chief Justice Campbell in the case of Duffield v. E. G. Barnum Iron Works Co., 64 Mich., 293, as follows. (In this case the court was equally divided):

"The question seems to be narrowed to the inquiry whether the amount stated in its articles of incorporation, the defendant not plaintiff is deprived of his remedy by the subsequent assignment. If there was no fault in not discovering the wrong, and if the suit was brought before any opposing claims had obtained a preference, it cannot be said there was any waiver, and it is difficult to see anything which can be treated as an estoppel. There is no foundation in reason or in law, so far as we can discover, for holding that he is debarred of complaint because others have also

been subsequently defrauded. A creditor who becomes such by fraud in obtaining his money for one purpose, has as distinct an equity as those who were afterwards defrauded or persuaded into giving credit for goods or supplies. Under our statutes stockholders are not personally liable to contribute beyond what will pay up their stock, and creditors cannot enforce any rights, under the assignment, against paid-up stock at all. But the suit of plaintiff is based on the claim that he never was properly to be considered a stockholder by the company, and, under this assignment, if anything, had remained unpaid on his shares, it would have been as a balance collectible by the company as his subscription, and not a debt due to creditors themselves as such. In England the winding up process is mainly to enforce contribution from shareholders, upon the theory that credit is given them as such. But even there it is very clearly held that the distinction taken between defrauded stockholders who sue before winding-up proceedings, and those who delay until after, does not depend upon any principle of estoppel in favor of creditors acting in faith of their membership, but upon the legal position which they are placed in by the winding-up proceedings whereby all persons registered as shareholders become, by operation of law, bound to contribute, because those proceedings themselves fixed their status.

"This is very clearly explained in Stone v. City and County Bank, Ltd., 3 C. P., Div. 282; and in that same case, where the authorities are reviewed and explained, it was strongly intimated that while after the proceedings begun for winding up, the plaintiffs could not avoid being treated as shareholders, they might have sued in that capacity for the damages incurred by the fraud of the company, which induced them to buy stock, and been treated as creditors for the damages.

"In Smith's case, before cited, it was expressly decided that creditors had no better claim than defrauded shareholders to sue for redress, and could not be preferred to them under circumstances which did not fix a legal priority. Lord Cairns there remarks: 'It is one of the risks, and it ought to be known that it is one of the risks which creditors are liable to in dealing with limited companies, that it may turn out that some person whose name has been entered as a shareholder in the list has a right to have his name taken off the list if he can prove that it has been fraudulently inserted there, and if he comes with promptitude to have the fraud redressed.' In other words, it is considered that, unless personally in the wrong in some way, all creditors stand on an equal footing for redress until, by some process, which the law has authorized to have that effect, they are placed on a different footing; and, if this is so, any remedy which is seasonably resorted to must be sustained.

"It is the settled law of this state that a creditor who has obtained security by attachment or otherwise before a general assignment cannot be deprived of his preference by that or any other subsequent action of his debtor. If he was defrauded, it is equitable that he should have a remedy; and if he has not contributed himself to mislead other creditors, there is no legal provision in this state to prevent him from seeking it in the same way as if no other creditors existed. None of our corporation statutes create any such difference in ordinary cases. How far it is done in the specific cases of personal liability existing in some instances by constitutional or statutory provisions, we need not inquire. The present case is no such case, and the assignee, or the receiver who represents him, only holds the property and rights of the corporation and not rights which the company itself could not enforce, except perhaps where property of the company has been fraudulently transferred. In this respect it varies considerably from the English winding-up acts. But as the suit here preceded the assignment, it would have been in season even there.

"In our opinion, the plaintiff had a plain right to maintain his action based on the fraud complained of, and the court below erred in holding otherwise. The judgment must be reversed and a new trial ordered. If the funds representing the attached property and reserved for this case are sufficient, without impairing the claim in controversy, the costs will be paid out of that. If not, they will be paid like other legal charges by the receiver."

In the case of Robinson v. Dickey et al. (14 Tex. Civ. App. 70), this question is passed upon as follows:

"1. Plaintiff, induced by false representations made to him by the officers of a bank, that the bank was solvent, and that the shares of stock which were to be delivered to him as part consideration were worth their face value, contracted to convey certain lots to the bank, on its agreement to erect a building thereon. The bank never completed the contract, further than to deliver the stock, and subsequently went into the hands of a receiver. *Held*, that plaintiff was entitled to a rescission of the entire contract on tender of the stock itself to the receiver."

See also recent decision of the Court of Chancery of New Jersey in Tierney v. Parker, 44 Atl. R., 151, and the decision of the Supreme Court of Virginia, in Weisiger et al., v. Richmond Ice Mach. Co., 20 S. E., 361.

We call attention to the recent decision of the Circuit Court of

the Ninth Circuit in the case of Stufflebeam v. De Lashmutt, 101 Fed., 367, as bearing on this, and as supporting the proposition contended for.

Also to the very able and clear review of the authorities upon this question made by Chief Justice Robinson, in the case of Savage v. Bartlett, etc., 78 Md., 561.

IV.

The somewhat recent decision of the court below (by a divided court) in the case of Scott v. Latimer, heretofore referred to, (89 Fed. Rep., 843), changed the rule in the Eighth Circuit, and practically decided (in advance of their reaching that court) the cases at bar.

As we read the decision in Scott v. Latimer, it is mainly placed upon the ground: That the liability of a stockholder is not contractual, but entirely statutory, and that although the contract, by which the stock is acquired, be induced by fraud, the rescission of such contract, cannot release the liability imposed by the statute (regardless, we should say, whether a receiver had been appointed or not). This, fully appears, from the 2nd, and 3rd, points of the syllabi, in the case, but more clearly, from the following extracts taken from the opinion of the majority of the court:

"If it be true that the subscription to the stock was obtained by false representations touching the pecuniary condition of the bank, that did not make the contract absolutely void, but only voidable at the option of the subscriber; and, therefore, when the bank was put in liquidation, the corporate creditors had the right to enforce the statutory liability against all persons who were then stockholders. * * Suits of this character, strictly speaking, are not actions based upon the contract of subscription existing between the corporation and the stockholder. * * * The right of the creditor to enforce the statutory liability against shareholders in a national bank is not dependent upon the terms of the stock subscription contract. * * * The liability sought to be enforced in this case is not one created by contract existing between the corporation and its stockholders, but is one created by statute in favor of creditors, and not in favor of the corporation. And it is a

liability which cannot be affected, discharged, or released by any action taken by the corporation, or by the combined action or agreement of the corporation and its stockholders. * * * * It is thus made clear that the liability sought to be enforced in this case is not dependent upon the terms, or in fact upon the existence, of a contract of subscription to the capital stock of the bank, but it is a liability imposed by statute in favor of creditors, and it is a liability, as already said, which cannot be modified or released by any action on the part of the corporation, or of the corporation and its stockholders. It is created for the benefit of the creditors, and no action on the part of the bank can estop the creditors from enforcing their rights in this particular. * * * As already said, this suit is not based upon the contract of subscription between the bank and the plaintiff in error, and is not, therefore, an action wherein the issue can be made as to the voidability of that contract, as between the bank and the shareholders. The suit is on behalf of the creditors to enforce the statutory liability, in which the bank has no interest; a liability which was not created by any contract to which the bank was a party; a liability which it is beyond the power of the bank to modify, release, or discharge; and a liability which, if once called into existence by the act of one assuming the position of a stockholder, cannot be defeated, save by the creditors, or some one acting in their behalf."

That the theory of the majority of the court in this case, that the contract of subscription or purchase has nothing to do with this liability is untenable, we have already seen.

We call attention of the court to the very vigorous, dissenting opinion of Justice Sanborn in this case, found on pages 856 to 865, quoting from it, as follows:

"It is held in those cases (the cases cited and relied upon by the majority of the court) that those who knowingly permit themselves in various ways to appear to be stockholders, those who were stockholders, but presented the false appearance that they were not, and those who fraudulently transferred their stock to irresponsible parties to escape liability, were estopped from defeating creditors of the corporation in their attempts to hold them as such. It is, indeed, repeatedly stated in those cases that the property of an insolvent corporation and the liability of the stockholder are a trust fund pledged for the benefit of the creditors; and that is equally true of every insolvent person. But in none of these cases —in no case cited by the court or counsel—was the holder of the stock duped into his place and liability by undiscoverable fraud.

In none of them did any court hold that money obtained from, or liability imposed upon, a stockholder by fraud which he could not discover are a trust fund held for the benefit of the creditors of the corporation which perpetrated the fraud. Can a debtor by fraud confer upon his creditors any greater right to the property or liability of his victim than he gets himself? * * * Why is not the right of one who is induced by fraudulent representations of a bank to buy its stock to a rescission of that sale and a release of the liability it imposes superior to the claims of its creditors, or its receiver to enforce them? * * * * In all the cases cited by the majority either a valid contract of subscription of purchase existed, or the stockholders were estopped from rescinding a voidable contract, because they had acted as such after they knew, or might have known, the facts upon which they relied to avoid it. In the case at bar the contract was induced by fraud, and it was concealed by fraud. In this case no estoppel against the plaintiff in error can be sustained, because he did not know and could not learn the facts, and no duty to speak or act rested upon him until he acquired that knowledge, or means of knowledge.

"The bank induced the plaintiff in error to play the part of a stockholder, and thereby to lose all the money he deposited with it, and to run the risk of liability to lose as much more by the same scheme of false representations of its solvency, of its flourishing conditon, and of its increase of stock, which doubtless induced the creditor to take the bank's promise of repayment for the money he deposited with it. In such a case, why should not the right of the purchaser of stock who suffers the greater wrong be equal to that of the creditor who suffers less? Neither of them was aware of the fraud, neither of them did or could discover it until both were injured. Neither of them knowingly or negligently deceived the other, and, in my opinion, neither of them is entitled to estop the other from undoing the fraud from which they suffer."

See also, McClenathan v. I. L. & I. Co., (Va.), 30, S. E. R., 450.

V.

The decisions of the courts in England followed by the court below do not militate against the proposition stated. The leading case of Oakes v. Turquand (L. R. 2, H. L., 325), and the subsequent cases, are each and all based upon the provisions of the English Act of 1862, entitled, "An Act for the Incorporation,

Regulation and Winding Up of Trading Companies and Other Associations" (Ch. 89, 25-26, Vict). See appendix, where some of the provisions are set out. This Act contains some 212 sections, collecting into one code the provisions which were thenceforth to be applicable to incorporations of the character provided for in the Act. By this Act, a public officer was appointed for keeping a register of, among other things, the name of the projected company; a statement of the nature of its intended business; the amount of its capital; the names and addresses of every subscriber, with the number of shares taken by him and the amount paid on each share. It further provides that the register shall be open to inspection, not only of the members, but all other persons, and that any person, whose name has been wrongfully registered may apply to any Superior Court of law for equity for a rectification of the register. In the event of the company being wound up the Act provides that every member shall be liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities.

Section 38 of the Act provides that shareholders within the preceding year, who have disposed of their shares, and are not registered at the time of the commencement of the winding up proceedings, shall, under certain circumstances and conditions, be liable to the payment of the debts, upon the winding-up of the corporation.

Shortly prior to the decision in Oakes v. Turquand, the House of Lords in the case of Railway Company v. Kisch (L. R. 2, H. L. 99), determined that one whose subscription to capital stock in an association was induced by fraud, had the right, upon the discovery of the fraud, to rescind his contract of purchase to the same extent as an individual would have the right in a contract between himself and another individual to rescind such contract for fraud.

Following this decision, came the case of Oakes v. Turquand, which we do not believe ever should have been construed as deter-

mining, even under this Act, that the commencement of winding-up proceedings, against a corporation, cuts off the right of a shareholder, under any, and all circumstances, to rescind his contract, of subscription, and have his name removed from the register. This belief is strengthened by the head-notes to the case, a portion of which we quote, as follows:

"Where a memorandum of association (which was registered) differed from the prospectus on which it professed to be founded, and on which as setting forth the true objects of the association, A, had become a shareholder, though he, on discovering the difference, might have repudiated his shares, he could not after the failure of the company, relieve himself from liability to contribute to the debts of the association, on the ground that he had been ignorant of something which, with proper diligence, he might have known.

"It is the duty of a person taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of the memorandum of association. He must take the consequences of the negligence." * * * "A applied, on the face of statements in the prospectus, for shares in a limited liability company. They were allotted. His name was put on the register of shareholders. At the end of nine months the company failed. It was ordered to be wound up. A then applied to have his name removed from the list of contributories;

"*Held*, affirming the decision of Malins, V. C., that it was properly placed there."

Conceding, however, for the sake of the argument, that this case, is as broad, as it has been construed to be, by some courts, and some text-writers, yet, it ought not to be an authority, in a case like the one at bar, as there are many notable distinctions, between the English Act, and the Acts of Congress, concerning national banks, some of which we call the court's attention to, as follows:

There is no requirement in the national banking acts, that one, having a right from any cause, to have his name removed from the registered list of stockholders shall proceed, in a court, to compel the taking of his name, from the register. The registered list of shareholders required to be kept by the bank is only *prima facie* correct, and only throws upon one, whose name appears upon such register, the burden of proving that it is not rightfully there; such

proof being always admitted, when for any reason a person, whose name appears upon the register, denies that it is rightfully there.

Whitney v. Butler, *supra;*
Hawley v. State Loan & Trust Co., *supra;*
Snyder v. Foster, (C. C. A. 5th Cir.), 73 Fed., 136;
Ricaud v. W. S. & T. Co., (C. C. A. 4th Cir.), 70 Fed., 424;
Young v. McKay, (C. C. N. D. Calif.), 50 Fed., 394;
Hayes v. Shoemaker, (C. C. N. D. N. Y.), 39 Fed., 319.

It must be conceded that a shareholder, in a national bank, induced to become such by the fraud of the bank, may, while it is a going concern, make a common law rescission, of his contract of purchase, and relieve himself from all liability.

Neither is there any provision for a public registry of names of the shareholders, in any national bank, which may be examined, by the public at large, or by any one, who intends becoming a creditor of such bank. The provisions of Sec. 5210, R. S., after providing for the keeping of a list of the shareholders, with the names and residences, provides:

"Such list shall be subject to the inspection of all the shareholders and creditors of the association and the officers authorized to assess taxes under state authority, during the business hours of each day in which business may be legally transacted. A copy of such list on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the comptroller of the currency."

Under the many decisions of this court, it is not essential that a person should be registered on the list of stockholders, in order to be held liable as a stockholder; neither is it essential that a person whose name may once have been rightfully on the register should see that it is removed, before insolvency proceedings, under penalty of being held as a stockholder, on account of such registration, if he has taken all the steps necessary to be taken, without resorting to a court, to have his name removed.

As we have seen, there is no act of Congress which places a receiver appointed for a national bank, in any better position, as to the assets of the bank, than would the assignee of an individual insolvent for the benefit of creditors, be placed in, by the rules of the common law.

THIRD POINT.

The court below erred in affirming the ruling of the Circuit Court sustaining each of the demurrers to each of the cross-petitions.

I.

Each of these answers included in addition to the defenses referred to, a cross-petition, against the receiver (based upon the facts stated in each of the separate defenses), to recover a judgment for the amount paid to the bank for this stock, asking that such judgment, when recovered, be paid by the receiver out of the funds in his hands, pro rata. The right to set up these counter-claims, in the answers, is given by sections 94 and 95 of the Kansas code, stating what an answer can contain.

Section 94 * * *

"A statement of any new matter constituting a defense, counter-claim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition."

Section 95 reads as follows:

"The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action. * * *"

The facts stated in this cross-petition, under the decisions of the Supreme Court of Kansas creates a counter-claim that can be used as a set-off.

In the case of Fanston v. Linsley, 20 Kan. 235, the second and third points of the syllabus are as follows:

"2. *When tort may be waived; benefit to wrongdoer.* Whenever one person commits a wrong or tort against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, *imply* or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to such wrongdoer. And when the injured party elects to waive the tort, his cause of action may be used as a set-off.

"3. *When a tort may not be waived; naked trespass.* Where one person commits a wrong or tort against another, without any intention of benefiting his own estate, and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of such wrongdoer to pay for the resulting damages; and such cause of action cannot be used as a set-off."

This decision has been repeatedly affirmed.

St. L. F. S. & W. R. R. Co. v. Chenault et al., 36 Kas. 51;

Smith v. McCarthy, 39 Kas., 308;

Frankhouser v. Neally, 54 Kas., 744.

In Smith v. McCarthy, *supra*, the first and second points of the syllabus read as follows:

"Where a person takes and sells the property of another, the owner may elect to waive the tort and sue upon the implied contract for the value of the same; and whether he has so elected, and the nature of the action brought, are to be determined by the court from the pleadings."

"In determining the effect of pleadings, they should be liberally construed with a view to substantial justice between the parties; and the pleadings herein are examined and are held to state a cause of action *ex contractu*."

In this case it was held that the following allegations stated a cause of action on an implied promise:

"The plaintiff avers that on the first day of October, 1885, one Jerry McCarthy, being at that time indebted to this plaintiff in the sum of nine hundred and twenty-five dollars, made, executed and delivered to the plaintiff his certain chattel mortgage in writing, a copy of which, with all the indorsements thereon, is attached hereto, marked 'Exhibit A,' and made a part of this petition; that said chattel mortgage was forthwith, on the delivery of the same, deposited by the plaintiff in the office of the register of deeds of Atchison county, Kansas, where said chattel property was situated

and the mortgagor resided; that on or about the 28th day of October, 1885, and while said chattel mortgage was in full force and effect, of record, and unpaid, the defendant, by and through her duly authorized and appointed agent, Ryan Smith, did take the fifty head of hogs mentioned and described in 'Exhibit A,' from the possession of the plaintiff mortgagor, Jerry McCarthy, without his consent, and without the consent of this plaintiff, and did convert the same to her own use and benefit; that the value of said fifty hogs was at said time, and now is, the sum of seven dollars a head, all of said hogs being of the value of three hundred and fifty dollars; that the plaintiff has duly demanded from the defendant the said hogs and all of them, which demand was refused; and that he also demanded the value of said hogs, to wit, the sum of $350, of and from defendant, which demand has been refused; that the plaintiff has a special ownership in and to said hogs to the amount of $925, being the amount of the chattel mortgage hereto attached. Wherefore, the plaintiff prays judgment against defendant for three hundred and fifty dollars, and costs of this action."

II.

We have difficulty in understanding the position of the court below with reference to these cross-petitions (Pr. tr., p. 31, term No. 180). That each of the plaintiffs in error had a claim good as against the bank, as for money had and received, must be conceded.

Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S., 138.

That such a claim was entitled to be established as a claim which was entitled to participation in the distribution of the assets must also be conceded.

Chemical National Bank of Chicago v. Hartford Deposit Co., 161 U. S., 1.

They being claims against the bank, the plaintiffs in error could, if they chose, bring suit directly against the receiver to establish the same as claims entitled to share in all distribution.

Southern Exp. Co. v. Western N. C. R. R. Co., 99 U. S., 191;

Denton v. Baker (U. S. C. C. A., 9th Circuit), 79 Fed., 189;

Speckart et al., v. German National Bank et al., 85 Fed., 12.

While it is clear that these claims grew out of an implied contract, yet if they grew out of a tort, there is no reason existing why they should not be paid pro rata with all other claims, or be used as a set-off to the extent that they are entitled to participate in the assets in an action of this character. While, of course, the establishment of these claims could only determine their right to receive the pro rata share in the distribution, yet to that extent they should be allowed as a set-off.

Scammon v. Kimball, 92 U. S., 362;
Carr v. Hamilton, 129 U. S., 252;
Scott v. Armstrong, 146 U. S., 499, *supra;* and cases cited;
Central Appalachian Co. et al., v. Buchanan (C. C. A. 6 Cir.), 90 Fed. Rep., 454, and cases cited.

III.

There is no conceivable view that can be taken of the facts stated in the cross-complaints which would not entitle the plaintiffs in error to a judgment against the receiver for the amount of each of their several claims, or the right to set the amount of such claims off *pro tanto* against any claim of the receiver, under the Kansas statute, *supra.*

Under the provisions of section 2334, Revised Statutes, and the decisions of this court (collated in Denton v Baker, *supra*), Hood, and Lantry, each, had claims against the Missouri National Bank at the time it was placed in the hands of the receiver, growing out of the admitted fraud of the bank in selling the stock it sold to them, whether they severally were, and are, stockholders, so far as the receiver is concerned, or not; or whether they be regarded as people who having been stockholders, ceased being such from the time of the attempted rescission of their contract of purchase, or whether they be regarded as persons who purchased over issued stock, and, therefore, never were stockholders. If they never acquired any stock, owing to the fact that the transaction was *ultra vires*, or if they rescinded the contract of

purchase of the stock rightfully, they each had a several claim against the bank for the amount of money which they paid for the stock, which can be enforced in this action as a counter-claim if such claims grew out of the same transaction as did the contract which the receiver is trying to enforce against each of them. On the other hand, if the receiver has the right to recover from them the assessments ordered by the comptroller, either upon the theory that they are estopped as to him, to deny the fact that they are stockholders, or that they have waived the right to deny that they are stockholders, by reason of their laches, or that after the insolvency of the bank and the appointment of the receiver it is too late, as to the receiver, to rescind the contract of purchase, or deny the fact of their being stockholders for any reason, such right of recovery would not, in any wise, interfere with the right of action on behalf of each of the plaintiffs in error against the bank on account of its fraud, as this right existed (whether plaintiffs in error knew it or not) at the time the bank was placed in the hands of the receiver. Plaintiffs in error have the right to establish these claims against the bank, either by a judgment of the court, or by the allowance of the receiver, under the provisions of section 2334, Revised Statutes (see Denton v. Baker, *supra*, and authorities there cited), and these claims can, in such case, be used as a set-off if it be held that they do not grow out of the same transaction involved in the matters set out in the petition.

The receiver, if he can recover at all, will recover because of the contract made between the plaintiffs in error and the bank for the benefit of the creditors of the bank, by the contract of purchase of this stock from the bank. If the plaintiffs in error have the several rights to recover against the bank, it is on account of their claims that grew out of the transaction of this purchase, upon which the right of the receiver is based, and consequently, it falls within the provisions of the Kansas code relative to counter-claims.

For the convenience of the court, we have placed in the appendix

copies of those portions of the National Bank Acts applicable to the case, and also some of the sections of the English Act of 25-26 Victoria, referred to.

All of which we respectfully submit,

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Attorneys for Plaintiffs in Error.

APPENDIX.

The following are all the sections of the Revised Statutes in reference to national banks having any application to the case under consideration:

"Sec. 5139. The capital stock of each association shall be divided into shares of $100 each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

"Sec. 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

"Sec. 5234. On becoming satisfied, as specified in section fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such

bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

"Sec. 5235. The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."

"Sec. 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency, in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Chapter 89 of Statutes 25-26, Victoria, enacted August 7, 1862, entitled "An Act for the incorporation, regulation and winding-up of trading companies and other associations," provided for the incorporation of trading associations, etc. The 18th, 23rd, 35th, 38th, 74th and 82d sections of the Act are, for the convenience of the court, here copied and set out:

18. Upon the registration of the Memorandum of Association, and of the Articles of Association in cases where articles of association are required by this Act, or by the desire of the parties to be registered, the registrar shall certify, under his hand that the company is incorporated, and in the case of a limited company, that the company is limited. The subscribers of the Memorandum of Asso-

ciation, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up, as is hereinafter mentioned. A certificate of the incorporation of any company given by the Registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with.

23. The subscribers of the Memorandum of Association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company.

35. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in *England* or *Ireland*, by motion in any of Her Majesty's Superior Courts of Law or Equity, or by application to a Judge sitting in Chambers, or to the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in *Scotland* by summary petition to the court of Session, or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. The court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may

be necessary or expedient to decide for the rectification of the register; provided that the court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal in the manner directed by "The Common Law Procedure Act, 1854," shall lie.

38. In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say):

(1) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up.

(2) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member.

(3) No past member shall be liable to contribute to the assets of the company, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act.

(4) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any unpaid on the shares in respect of which he is liable as a present or past member.

(5) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the Memorandum of Association.

(6) Nothing in this Act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract.

(7) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves.

74. The term "Contributory" shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up. It shall also in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory.

82. Any application to the court for the winding-up of a company under this Act shall be by petition; it may be presented by the company, or by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately; and every order which may be made on any such petition shall operate in favor of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.

Nos. 179 and 180

JAN 31 1901

JAMES H. MCKENNEY, Clerk

Brief of Cochran for D. Def.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Jan. 31, 1901.

No. 179.

CALVIN HOOD, *Plaintiff in Error*,

vs.

T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City,

Defendant in Error.

No. 180.

C. J. LANTRY, *Plaintiff in Error*,

vs.

T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City,

Defendant in Error.

In Error to the United State Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

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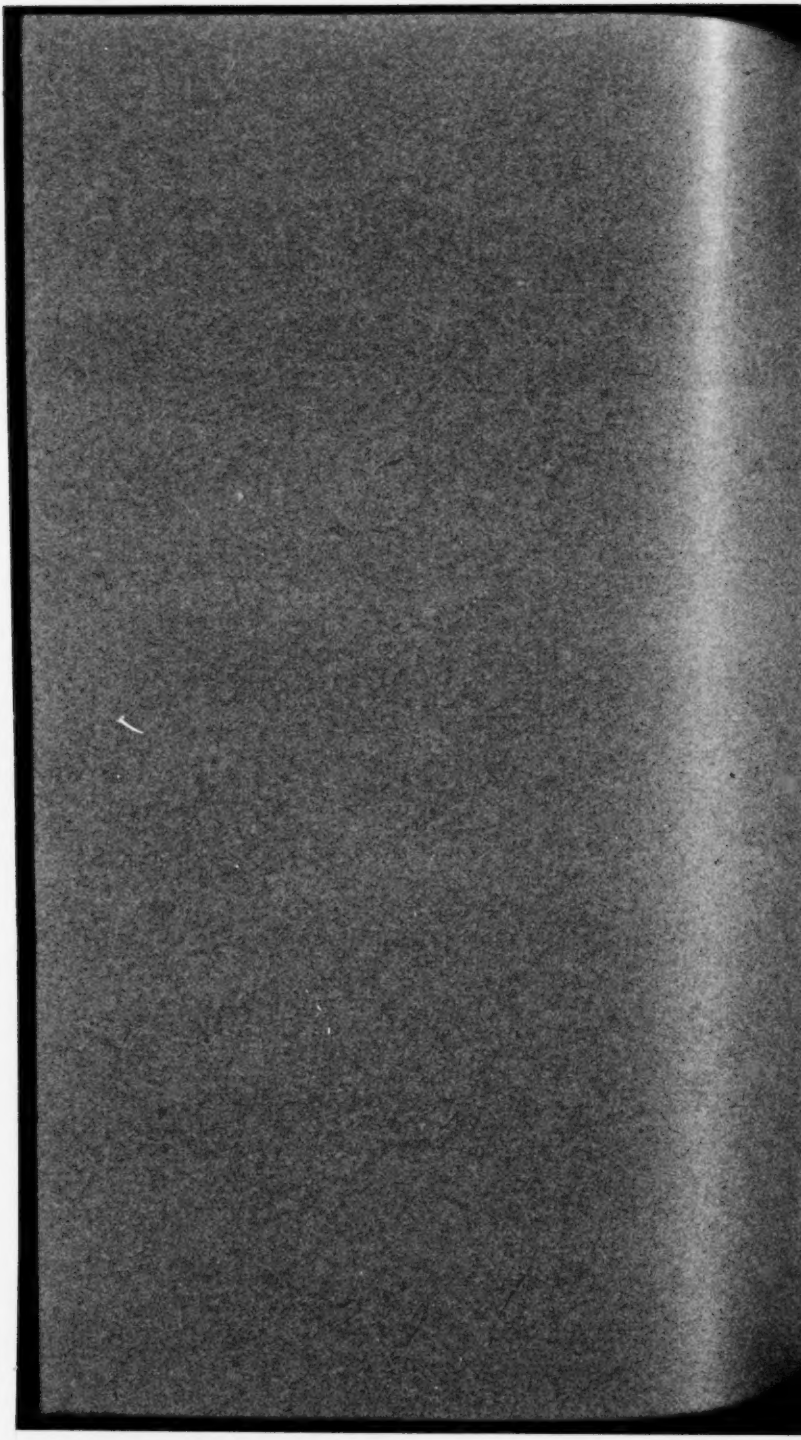

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Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

These were actions at law brought by T. B. Wallace, as Receiver of The Missouri National Bank of Kansas City, under direction of the Comptroller of the Currency, to enforce the stockholders' liability of Calvin Hood and Charles J. Lantry, who are the owners and holders of 100 and 200 shares respectively of the stock of said bank.

The issue tendered by the amended and substituted answers and cross-petitions in these cases are identical, and by agreement of counsel they have been briefed and argued together as if there were but one case.

After an original answer and cross-petition and many amendments, defendant, in each case, filed an amended and substituted answer and cross-petition on the 15th day of August, 1898, to which plaintiff filed a demurrer on the same date.

The first defense alleges that defendants were urged by the president of the Missouri National Bank to buy the stock of said bank, as it was the desire of said bank "to have them own stock of the said bank and their names connected with it, *as they were men of means and large business acquaintance in the State of Kansas, and that their connection with the said bank would be of benefit to it, because it would attract and secure a large amount of Kansas business otherwise unobtainable.*" [Record p. 6] and that they were induced by a number of false representations as to the condition of the bank to purchase, one, 100 shares and the other, 200 shares of its stock, for which they paid the full par value [Record pp. 8, 14, 15]; that certificates were issued to them, dated April 18, 1896 [Record pp. 9, 13, 15]; that they continued to hold said certificates of stock so issued and delivered to them until the 3d day of December, 1896, when the bank failed, and defendant in error was appointed Receiver [Record pp. 9, 10]; *that the Missouri National Bank received the money so paid by them for the purchase of said stock, and that the same was for the use and benefit of said bank* [Record p. 9]; that while they investigated the condition of said bank, and made full inquiries about its history, which investigation covered the period of several weeks [Record p. 6], and were furnished with a list of the securities and assets of said bank [Record p. 7], and secured the services of two expert bank examiners to examine the assets and condition of said bank [Record p. 8] before purchasing the stock, they were unable to discover the falsity of the representations made to them; that they made no such discovery durthe seven and a half months they continued to be stockholders prior to the failure of the bank; that from the time the certificates of stock were delivered to them "said bank was apparently doing a very large business, having a daily average of one million five hundred thousand ($1,500,000) deposits" [Record p. 8;] that after the failure they were deterred from making an examination by the fact that the books and papers were in the hands of the Receiver, who refused to let them inspect them [Record p. 9] until the 1st of September, 1897, when they received permission from the comptroller to inspect the books,

and thereupon " did make a careful and thorough examination into the actual condition and affairs of the bank," and " for the first time learned that the said representations made by the said D. V. Rieger, about the condition of said bank, were false, fraudulent and untrue " [Record p. 10]; that thereafter, on or about the 27th day of October, 1897, they tendered to the Receiver their certificates of stock, notifying him that owing to the fraud and deceit practiced upon them they disaffirmed the contract, and demanded that he cancel the certificates and repay to them the sums paid by them respectively, or such proportionate part thereof as they would be entitled to receive as creditors of the bank.

It will be noted, that they held this stock for nearly eight months before the failure of the bank and took no action to disaffirm the contract, until after the comptroller had made an assessment of one hundred dollars per share on their stock to pay the debts of the bank.

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The second defense incorporates, by reference, all the facts stated in the first defense, and alleges that prior to and during the negotiations with Lantry and Hood the officers of the bank "purchased or pretended to purchase from the stockholders or alleged stockholders of the said bank, with the funds of the bank, shares of the outstanding capital stock of the bank *in order to prevent exposure, by the stockholders owning such shares, of the actual condition of the bank;*" that such purchases were made in the names of officers or clerks of the bank, who received certificates therefor and gave their notes to the bank for money advanced by the bank to purchase the stock; that said purchases were not made for any reason or in any way authorized by law, and depleted the capital of the bank; that the president and other officers of the bank represented to them, when they were investigating the condition of the bank, "that all of the capital stock of said bank had been subscribed and issued to *bona fide* and actual purchasers in good faith, and was then held and owned by such parties as stockholders of said bank, *except an amount of said capital stock which said bank then had on hand, which had been taken in by the said bank to prevent a loss or indebtedness which had been previously contracted in good faith, and which had been taken in by the bank without violating the banking laws of the United States; that said defendant, believing said statements, did then and there purchase of the bank,*" etc., [Record pp. 13 14]; and, finally, "*that said parties who held said stock never at any time received the purchase money paid by this defendant for said stock, but the same was retained and kept by the bank.*" [Record p 15.]

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The cross-petition incorporates, by reference, all of the facts alleged in the first and second defenses; alleges that by reason thereof defendant has been damaged in the sum paid for the stock, and prays judgment against the Receiver for said sum, with interest from the 18th day of April, 1896, the date of the original purchase of said stock, and that the Receiver may be ordered to pay it ratably out of the assets and funds of said bank in his possession.

The plaintiff demurred, separately, to each of these defenses and to the cross-petition, on the grounds:

I. That this is an action at law to enforce the statutory liability of defendant as a stockholder in the Missouri National Bank for the benefit of creditors of said bank, and such defense, or counter claim, if it constitutes any defense, or counter claim at all, is an equitable defense, or counter claim, and can not lawfully be set up in this case.

II. That such defense is based upon alleged frauds, which were not committed by plaintiff, or the creditors for whose benefit this action is brought, but were, as alleged, committed by the Missouri National Bank, which is, therefore, a necessary party to the issues tendered by said defense, but is not a necessary or proper party to the original action, and that an off-set or counter claim against the bank itself can not properly be set up by the stockholder in an action brought by the Receiver to enforce the statutory liability of the stockholder.

III. That such defense, or cross-petition does not state facts sufficient to constitute a defense to plaintiff's cause or action stated in the petition, or to entitle defendant to any relief as against plaintiff. [Record pp. 16, 17.]

The cases were argued before Judges Phillips and Williams, and the demurrers were sustained September 28, 1898. [Record p. 18.] Judge Phillips handed down an able and elaborate opinion, which is reported in 89 Fed., p. 11.

Subsequently, November 28, 1898, Judge Riner gave judgment for the plaintiff in both cases for the full amount claimed, with interest from the time when defendants should have paid their assessments. [Record pp. 19, 20.]

The cases were then taken to the United States Circuit Court of Appeals on error, and that Court affirmed the judgments of the Court below. [Record pp. 27, 28, 31, 32.] The opinion of the Court is reported in 97 Fed., p. 865, and is printed in the Record in case No. 180 at pp. 26 to 31 inclusive.

The sustaining of the demurrers to the several defenses and cross-petition, and the rendering of judgment for plaintiff, are assigned as errors.

ARGUMENT.

We think a discussion of the questions in the order in which they are presented by the defenses, cross-petition and respective demurrers will facilitate an understanding of the case. We shall not attempt, therefore, to follow the order adopted in the brief of counsel for plaintiff in error.

The First Defense.

The first defense, by necessary implication, admits every allegation of the petition, the proper organization of the Missouri National Bank of Kansas City under the national bank act, its failure and the appointment of defendant in error as Receiver, December 3, 1896, the necessity for enforcing the individual liability of the stockholders and the assessment of $100 upon each and every share of its stock. It admits expressly that plaintiffs in error became purchasers, one, of 100, and the other, of 200 shares of said stock, April 18, 1896, and continued to hold them until after the failure of the bank seven and a half months later, and that they took no steps in all that time to rescind their purchase and to compel the bank to take back the stock.

It states that when they purchased the stock they were advised that it was the desire of the bank "to have them own stock of the bank and their names connected with it, *as they were men of means and large business acquaintance* in the State of Kansas, and that their connection with the said bank *would be of benefit to it, because it would attract and secure a large amount of Kansas business otherwise unobtainable.*" [Record p 6.]

It further states that from the time of the delivery of the certificates of stock to them, "said bank was apparently *doing a very large and prosperous business, having about a daily average of one million five hundred thousand* ($1,500,000) *deposits.*" [Record p. 8.]

They cannot, therefore, deny that many creditors of the bank became such *after* their connection with it as stockholders, or that old depositors continued business with the bank and made fresh deposits after such connection, or that they were influenced, to some extent at least, to become, or continue to be creditors of the bank, by the fact of their being stockholders.

The parties are presumed to have known, at the time of their purchase of stock, the provisions of Sec. 5151, holding the share-

holders of every national banking association "individually responsible, equally and ratably, * * * for all contracts, debts and engagements of said association, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares."

When the bank failed they were still stockholders, and the action of the comptroller in assessing their stock was final and conclusive.

Kennedy v. Gibson, 8 Wall., 498.
Casey v. Galli, 64 U. S., 673.
United States v. Knox, 102 U. S., 422.
Bushnell v. Leland, 164 U. S., 684.

The first defense, if we understand it, amounts to this: that while they were legal owners and holders of the stock, and, as such, liable to pay their assessments, yet they ought not to be regarded as such owners and holders because they were induced to purchase it by the fraudulent misrepresentations of the president of the bank as to its condition and the value of the stock; its condition being in fact bad and the stock, practically worthless.

The demurrer to this defense rests upon three grounds.

I.

This is an action at law to enforce the statutory liability of the defendant as a stockholder in the Missouri National Bank for the benefit of the creditors of said bank, and said first defense, if it constitutes any defense at all, is an equitable defense, and cannot lawfully be set up in this case.

What is it defendant seeks to gain by this answer? Is it not to be put back in the position he would have occupied if he had never purchased or paid for his stock? He does not ask damages or to recover the money paid out for the stock—that comes later. What he wants and what he must have, if he relies upon this defense alone, is a rescission of the contract of purchase and a cancellation of the certificate and record showing that he is a stockholder. Can a court of law grant such relief? Manifestly not. A court of equity may, if the suit is brought in time, upon a proper showing and with the proper parties before it. But in the United States courts legal and equitable claims cannot be blended together in one suit, nor are equitable defenses permitted in actions at law.

In Northern Pacific R. R. Co. v. Paine, 119 U. S., 561,563. an action at law was originally brought in the State court, and both legal and equitable defenses were interposed.

Mr. Justice Field says:

"The case was then removed, on application of the defendant, from the State court to the Circuit Court of the United States. In that court the equitable defense could not be made available. In the courts of the United States, to legal actions legal defenses only can be interposed. If the defendant have equitable grounds for relief against the plaintiff he must seek to enforce them by a separate suit in equity."

In that case defendant admitted a sale of lands by himself to plaintiff and the legal title of plaintiff, but averred, in an action for damages for the conversion of certain timber thereon, that he had been induced to make the sale by fraudulent misrepresentations and had repudiated the sale and prayed: (1) that plaintiff take nothing by his action; (2) that the sale be adjudged void; and (3) plaintiff be decreed to reconvey, etc., on tender to him of the preferred stock taken in exchange for the same.

Mr. Justice Field says (p. 575):

"This defense was not, as already stated, available in the action at law after the removal of the case to the Circuit Court of the United States."

In Scott v. Armstrong, 146 U. S., 512, Chief Justice Fuller says:

"The jurisprudence of the United States has always recognized the distinction between law and equity as under the constitution matter of substance, as well as of form and procedure, and accordingly, legal and equitable claims cannot be blended together in one suit in the Circuit Court of the United States nor are equitable defenses permitted."

In Montejo v. Owen, 17 Blatch, 324, plaintiff brought an action at law on a judgment obtained by him in another State. The answer set up a number of defenses which were not defenses at common law, but which, it was claimed, gave defendant an equitable right to prevent the enforcement of the judgment. The Court says:

"This so-called defense is an affirmative equitable right to the relief asked * * * * The action is at common law. The defense is substantially an action in equity, and it can not,

because it assumes the guise of an answer or defense under the State law, escape from the control of the laws of the United States as to the modes of enforcing equitable rights. The demurrer must be sustained." [p. 327.]

In Sheafe v. Larimer, 79 Fed., 921, 923, Judge Shiras said:

"Although the defendant sets forth in the answer the facts relied upon as constituting false representations, *a rescission of the contract of sale is not prayed for, nor could it be properly sought in this action, the same being at law.*"

In Hill v. Northern Pacific Ry. Co., 104 Fed., 754, defendant set up as a defense to the action, which was one at law to recover damages, a written release by the plaintiffs on payment of an agreed sum in settlement of the cause of action, to which the plaintiffs replied that they were induced to make the settlement and to execute the release by false and fraudulent representations of the defendant's agents.

The Court held that the release could not be impeached in the action at law, and said:

"This defense to the action is an executed contract and proceedings to set it aside should be in equity, because the court, in relieving the plaintiffs from the obligation of their contract after it has been executed, must exert extraordinary power. 'Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity.' Delaine Co. v. James, 94 U. S., 207-214" (p. 756).

See also Bennett v. Butterworth, 11 How., 669, 674, 775.
La Mothe Mfg. Co. v. Nat'l Tube Works, 15 Blatchf. 432, 435, 436.
Parsons v. Denis, 7 Fed., 317.
Doe v. Roe, 31 Fed., 97, 99, 100.
Buller v. Sidell, 43 Fed. 116, 117.

Citations of decisions of State Courts, where the distinctions between actions at law and suits in equity have been abolished and where defendants are allowed to set up as many defenses as they may have, whether they be such as have been heretofore denominated legal or equitable or both, are misleading and so are all text-book readings based upon such decisions.

We readily concede that if the allegations of the first defense showed that the stock purchased by Hood and Lantry was *overissued* or *unauthorized* stock, and therefore *void*, the defense would be good and a resort to equity unnecessary. Such was the case in:

Scevill v. Thayer, 105 U. S., 143.
Laredo Imp. Co. v. Stevenson, 66 Fed., 633.
Newton Nat. Bank v. Newbegin, 74 Fed., 135.
Winters v. Jackson, 37 Fed., 509.
New York, etc., R. R. Co. v. Schuyler, 34 N. Y. 30.

and a number of other cases cited by counsel for plaintiffs in error.

We also concede that, if a contract is illegal, prohibited by law, or otherwise *void*, no action can be maintained upon it. Such was the case in ;

Concord First Nat. Bank v. Hawkins, 174 U. S., 364, 371.
California Bank v. Kennedy, 167 U. S., 362.
McCormick v. Market Nat. Bank, 165 U. S., 550.
Central Transportation Co. v. Pullman Car Co., 139 U. S., 24,

and a number of other cases cited by counsel for plaintiffs in error.

But, as was [illegible] in Scovill v. Thayer, 105 U. S., 143: "A distinction must be ma[illegible] between shares which the company had no power to issue and shares which the company had power to issue, although not in the manner in which, or upon the terms upon which they have been issued. The holders of shares which the company has no power to issue, in truth *had nothing at all and are not contributors.*"

The first defense states clearly enough that the stock bought by Hood and Lantry was part of the original authorized stock of the bank, and therefore was not *itself invalid*. It was represented by the President to have been acquired by the bank in a lawful way, and was bought by Hood and Lantry, in good faith, relying upon that statement. [Record pp. 8, 12.] The stock therefore was good ; their title was valid ; and the only trouble was that they were deceived as to its *value*. This may have rendered the contract of purchase *voidable*, but not *void*.

Johnston v. Laflin, 103 U. S., 800, 802, 805.

The claim that the bank acquired the stock unlawfully, and that the transaction by which it was sold to Hood and Lantry was therefore void was raised in the second defense and will be treated in that connection.

Prior to the failure of the bank and the appointment of the receiver, there was no attempt on the part of the defendant to rescind his contract, and, as the bank can not now consent if it would, such rescission can only be effected in a court of equity on a proper showing. The assumption of defendant that he can rescind all by himself without

the consent of the other party to the contract, without regard to the rights of creditors, without proof of the facts which entitle him to such rescission and without the aid of a court of equity, is untenable. Completely executed contracts are not so easily set aside, and the legal liabilities of stockholders are not so easily thrown off. The fact that he does not, in either defense, pray for relief, does not alter the nature of his defense. A court of law cannot grant such relief, and can only proceed to enforce by judgment and execution the legal liability, it being once admitted that defendant was legally a stockholder.

II.

Said first defense is based upon alleged frauds, which were not committed by plaintiff or the creditors, for whose benefit this action is brought, but were, as alleged, committed by the Missouri National Bank, which is, therefore, a necessary party to the issues tendered by the defense, but is not a necessary or proper party to the original action.

The receiver, in these cases, is not pressing any claim of the *bank* against Hood and Lantry. He is pressing a claim which the bank itself could not enforce. Delano v. Butler, 118 U. S., 635, 653, 654. Neither he, nor the creditors whom he represents, committed the frauds of which the stockholders complain. They knew nothing of them. The party who, it is alleged, did perpetrate the fraud is not a party to the suit. It certainly is interested in the determination of this question, and we do not see how any rescission on the ground of fraud can be granted, or judicially recognized, in a suit to which it is not a party.

See Western Nat. Bank v. Armstrong, 152 U. S., 346, 354, 355.

III.

Said first defense does not state facts sufficient to constitute a defense to the plaintiff's cause of action stated in the petition, or to entile defendant to any relief as against plaintiff.

It is hardly worth while to combat the proposition of counsel for plaintiffs in error that the stockholder is under a *contract* obligation to pay the full amount of his stock, if necessary to satisfy creditors, upon the failure of the bank. It is certain that, if it be a contract it is not

one which the *bank* can enforce. The liability is one *imposed by statute* and not for the benefit of the bank, but for the benefit of creditors.

Sawyer v. Hoag, 17 Wall., 610, 620.
Upton v. Tribilcock, 91 U. S., 47.
Sawyer v. Upton, 91 U. S., 56, 60.
Richmond v. Irons, 121 U. S., 27, 55, 56.
Handley v. Stutz, 139 U. S., 417, 427.
Stuart v. Hayden, 169 U. S., 1, 8.
Matteson v. Dent, 176 U. S., 521, 526.
Sheafe v. Larimer, 79 Fed., 924.
Scott v. Latimer, 89 Fed., 843.
Wallace v. Hood, 89 Fed., 15.
Bailey v. Tillinghast, 99 Fed., 806.

It can be enforced only to the extent necessary to pay their claims. The receiver represents creditors only in bringing these suits and no defense, however valid as against a claim of the bank, can be of any avail as against creditors of the bank, unless it can be shown that the stock was *void*, or that the contract of subscription or purchase was rescinded *before* the rights of creditors intervened.

If the plaintiffs in error had been able to allege that no creditors of the bank became such, or continued to carry on business with the bank and make deposits, *after* they purchased the stock, we might concede the right to rescission, because rescission, under such circumstances, would not injuriously affect the rights of any who were not in privity with the bank ; but the allegations of this defense as to the large volume of business carried on by the bank and the large average daily deposits after they became stockholders, leave no room for doubt that the equities of hundreds of creditors have intervened and would be prejudiced by rescission.

For more than forty years the courts of England and this country have had to deal with efforts of stockholders to evade their statutory liability on stock subscribed or purchased by them, after the failure of corporations, on the ground that they had been induced, by fraudulent misrepresentations on the part of company officers or agents, to subscribe for or purchase the stock.

During that period the courts, while differing somewhat in their reasoning, have uniformly held that while such fraudulent conduct on the part of the company's agents might justify a rescission if the party defrauded acted promptly and before the rights of third parties intervened, it was too late to rescind after the failure of the company,

owing more than its assets would pay, making it necessary, in order to pay creditors, to enforce the stockholders' liability ; and it was said in nearly all of them that it was immaterial that the stockholder did not find out that he had been defrauded until after the failure. The equities of creditors were then superior to his equity.

The leading cases are as followe :

ENGLAND.

1857. Henderson v. Royal British Bank, 7 El. & Bl., 356, 363, 364.

1858. Clarke v. Dickson, El. Bl. & El., 148, 154.

1867. Oakes v. Turquand, L. R., 2 H. L., 325, 345, 350.

1872. Pugh & Sharman's Case, L. R., 13 Eq., 566, 572.

1877. Stone v. City and County Bank, L. R., 3 C. P. Div., 293, 294, 295, 299, 307, *et seq.*

1879. Tennent v. Glasgow Bank, 4 App. Cas., H. L. (Sc), 615.

1880. Burgess' Case, 15 Ch. Div., 509, 511, 512.

1880. Houldsworth v. City of Glasgow Bank, 5 App. Cas., 317, 322.

1883. Re Scottish Petroleum Co.; Wallace's Case, 49 L. T., (N. S.) 348, 355

1890. Lennox Publishing Co., In re, 62 L. T., (N. S.) 791.

1898. Central Klondyke Gold, &c. Co., In re Thomson's Case, 5 Manson, 282, 336.

1899. General Railway Syndicate, In re Whiteley's Case, 80 L. T., (N. S.) 868 ; 6 Manson, 244.

U. S. SUPREME COURT.

1859. Ogilvie v. Knox Ins. Co., 22 How., 380, 389, 390.

1875. Upton v. Tribilcock, 91 U. S., 45, 50, 54, 55.

1877. Chubb v. Upton, 95 U. S., 667.

1877. Pullman v. Upton, 96 U. S., 328, 330, 331.

1891. Finn v. Brown, 142 U. S., 56, 71.

1896. Pauly v. State Loan & Trust Co., 165 U. S., 606, 622.

U. S. CIRCUIT COURTS AND COURTS OF APPEAL.

1874. Upton v. Englehart, 3 Dill., 496, 503, 504.

1875. Farrar v. Walker, 3 Dill., 506, 510.

1896. Latimer v. Bard, 76 Fed., 536, 540, 541.

1897. Sheafe v. Larimer, 79 Fed., 921, 923.

1897. Tillinghast v. Bailey, 86 Fed., 46, 48.
1898. Wallace v. Bacon, 86 Fed., 553, 556.
1898. Scott v. Latimer, 89 Fed., 843.
1898. Wallace v. Hood, 89 Fed., 11, 15, 16, 23.
1899. Lantry v. Wallace, 97 Fed., 865, 867, 868.
1900. Bailey v. Tillinghast, 99 Fed., 801, 808.

NEW YORK.

1858. Empire City Bank, 6 Abb. Pr., 385, 402.
1860. In re Reciprocity Bank, 22 N. Y., 9, 17.
1875. Ruggles, Receiver, v. Brock, 6 Hun., 164.
1879. Hurd v. Kelley, 78 N. Y., 588, 597.
1881. Briggs v. Cornwell, 9 Daly, 436, 438, 439.

OTHER RECENT CASES.

1880. Turner v. Granger Life Ins. Co., 65 Ga., 649, 651, 652.
1881. Jewell v. Rock River Paper Co., 101 Ill., 57, 67, 68.
1887. Duffield v. Barnum Iron & Wire Works, 64 Mich., 293, 300.
1890. Howard v. Glenn, 85 Ga., 260 to 262.
1893. Howard v. Turner, 155 Pa. St., 349, 357, 358.
1894. Bissell v. Heath, 98 Mich., 472, 475, 476.
1894. Dunn v. State Bank, 59 Minn., 221, 228, 229.
1897. Olson v. State Bank, 67 Minn., 267, 274 to 279.
1897. Harrington v. Connor, 51 Neb., 214, 219.

An examination of these cases will disclose that every argument and suggestion made by counsel for plaintiffs in error in this case has been urged, considered and decided in some one or more of them.

We quote from the opinions in some of them by way of illustration.

In Henderson v. Royal British Bank, 7 El. & Bl., p. 364. the Court says:

"This is an application by a creditor who, upon the faith of the party, who was then a shareholder and who held himself out to the world as a shareholder and being one, gave credit to the bank. * * *

"It would be monstrous to say that he, having become a partner and a shareholder and having held himself out to the world as such, * * * could thus get rid of his liability to the creditors of the bank who had given credit to it on the faith that he was a shareholder.

* * * "Suppose this was a common partnership and that there

was credit given to the firm, would it be any answer to an action by the creditor against one of the partners that the defendant was fraudulently induced by the other partners to become a partner?"

In Clarke v. Dickson, El. Bl. & El., 148, 154, Erle, J. says:

"Lastly the offer to restore these shares is not made till after the company is in the course of being wound up, when all chance of profit is over and the shares can only be a source of loss. I have looked at this as if no others were concerned but the plaintiff and the defendants; but no doubt *there may have been liabilities incurred by the plaintiff to third persons rendering it impossible for him to rescind.*"

In Oakes v. Turquand, L. R. 2 H. L., 345, 346, the Court says:

"On the part of the shareholders it is contended that a person who has been induced by fraud to enter into a contract to take shares, and whose name is afterwards placed upon the register, never becomes a shareholder because his agreement, being obtained by fraud, is of no validity." * * *

"It is a settled rule of law, as Mr. Justice Crompton says in Clarke v. Dickson, E. B. & E., 148, 'that a contract induced by fraud is not void but voidable only at the option of the party defrauded. If it were otherwiee—if a contract induced by fraud were void—there would be an end of the question in this case because a contract void in itself can have no valid beginning, and Oakes never would have become a shareholder of the company.'" (348.)

The Court then expressly affirms Henderson v. Royal British Bank, 7 E. & B. 355, (p. 348), and says, (p. 350):

"But, when the order for winding up came and found him with the shares in his possession and his name upon the register the agreement was a subsisting one. How could it then be said that he was not a person who had agreed to become a member? To hold otherwise would be to disregard the long and well established distinction between void and voidable contracts." * * * * *

"The liability of the shareholders is not under a contract with the creditors, but it is a statutory liability, under which the creditors have a right which attaches upon the shareholders to compel them to contribute to the extent of their shares towards the payment of the debts of the company. * * * * * * * * *

* * * The application of the creditor was resisted by the shareholder on the ground that he had been induced by fraud to take the shares. It is a fair answer by a creditor to such a defense to say I know nothing of the circumstances which led you to become a shareholder; all I know is that you, in fact, allowed yourself to be represented as being a shareholder and on the faith of your being so, I trusted the company. (pp. 361, 362) * * * * *

"The argument is that he did not so agree, because all which he did, he did under the influence of fraud and misrepresentation. But

assuming all that to be, and I believe it was just as Mr. Oakes represents it, still he did agree to become a member—that is, he in fact, agreed. He may have full rights against those who deceived him, but with that the outer world can have no concern. The Legislature took care to provide the register as the means of enabling persons dealing with the company to know to whom and to what they had to trust. It intended to put the persons whose names are on it in the same position towards creditors * * * as persons engaged in an ordinary partnership or persons trading formerly under the acts of 1844. In neither of these cases would it have been any answer to a creditor, that the person sought to be charged had been induced by fraud to become a partner or a shareholder, and I see no reason whatever for adopting any other principle here." (367.)

"It is impossible to allow a person who has taken shares and has gone for nearly a year taking his chances of profit, to turn round when the speculation has proved a failure and claim to be released on the ground that he was ignorant of something with which the least diligence must have made him acquainted." (369.)

In Stone v. City and County Bank, L. R., 3 C. P. Div., 293–4–5, the Court says:

"Before the plaintiffs repudiated their shares and before, in fact, they discovered the fraud entitling them to repudiate their shares, a resolution was passed for winding up the company voluntarily. * * * And it is admitted * * * the assets of the company, including its uncalled capital, were not sufficient to pay its undisputed debts and liabilities. * * * * * * *

"I am of opinion that this winding up and state of assets are fatal to the plaintiffs and afford a complete defense to both actions. * * * * * * * * * * *

"Their claims are based on the theory that they are no longer shareholders—on the theory, namely, that notwithstanding the winding up and the state of the assets to which I have alluded, they had a right to rescind them and *had rescinded* their contracts before the commencement of their action. *But if the plaintiffs had no right to rescind their contracts their actions were not sustainable.*"

"Now it appears to me that Oakes v. Turquand, L. R. 2, H. L., 325, shows conclusively that the plaintiffs had no such right. It was contended by the plaintiffs that, for several reasons, this decision did not apply to the present cases. First, it was said that it does not appear that any of the debts of the company were contracted on the faith of the plaintiffs being members of it, and that the decision in Oakes v. Turquand was based on what Lord Campbell said on the subject of estoppel in Henderson v. Royal British Bank (7 R. & B., 356).

"But in the first place it did not appear in that case that Henderson trusted the Royal British Bank by reason of Goddard being a shareholder in it, nor was there evidence in Oakes v. Turquand that any creditors in particular had trusted Overend, Gurney & Co., Ltd.,

by reason of Oakes being a shareholder therein. The observations in both cases on the subject of estoppel are of a general nature, and, as I understand them, are *applicable to all registered companies whose registers of shareholders are open to inspection without reference to the question whether any particular member has more or less induced credit to be given by any particular creditor.* * * * * * *

"I doubt whether a shareholder is liable upon the ground of estoppel. I think his liability depends upon a principal similar to that upon which the decision in Kingsford v. Merry (11 Ex., 577) proceeded. It was there held that *if the owner of goods sells them, owing to a fraudulent representation, and if, before he discovers the fraud, another person acquires some claim to them, he cannot afterwards rescind the contract, and I think it clear upon the authorities that whenever the rights of other persons intervene a contract to take shares, though induced by fraud, cannot be rescinded.*" (pp. 308, 309.)

In Re Scottish Petroleum Co.; Wallace's Case, 49 L. T. (N. S.) 348, 355, Fry, L. J., said:

"Now the general principal is that no contracts can be rescinded so as to effect rights acquired *bona fide* by third parties under it. It is true the creditors and the other shareholders have not acquired direct interests under the contracts; but they have acquired an indirect interest. The shareholders have got a co-contributory; the creditors have got another person liable to contribute to the assets of the concern. * * * There must, in the case of a voidable contract to take shares, be repudiation and something more before the winding up commences."

Sec. 5210 of the National Bank Act requires that:

"The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association and the number of shares held by each, in the office where its business is transacted. *Such list shall be subject to the inspection of all the shareholders and creditors of the association.*"

In Pauly v. State Loan & Trust Co., 165 U. S., 612, 621, 622, the Court says:

"Manifestly one, if not the principal object of this requirement, was to give creditors of this association, as well as State authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts and engagements.' (Pullman v. Upton, 96 U. S., 328, 330, 331; National Bank v. Case, 99 U. S., 628, 631.) * * *

"It is true that one who *does not in fact invest his money in such shares, but who,* although receiving them simply as collateral security for debts or obligations, *holds himself out in the books of the association*

as the true owner, may be treated as the owner and therefore liable to assessments when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner; and he *will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors.* If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of stockholders required to be kept for the inspection of creditors and others would lose most of its value."

The arguments based upon the public registry of stockholders in England, therefore, apply with equal force to the stockholders of national banks.

In Upton v. Englehart, 3 Dill., 496, 503, Judge Dillon says:

"But the proposition is not a sound one that the right of a person, who has been drawn into the purchase of stock by the fraud of a company or its agents, to relief, is as great against creditors as it would be against the company. * * * If their corporate representatives or its agents have practiced a fraud upon him he is entitled to relief against it. But if a person has accepted a certificate of stock and becomes *to all external appearances a stockholder, persons may have become creditors of the company on the faith of his membership and in law are presumed to do so*, and as they cannot know the manner in which he was induced to become a stockholder there is ground to maintain that as to them the manner is immaterial."

In Pullman v. Upton, 96 U. S., 328, 330, Justice Strong says, citing with approval Adderly v. Storm, 6 Hill, 624:

"The retransfer was not made, however, until March 2, 1840, and the defendants were held liable as stockholders for a debt of the company contracted in January, 1840, and *this it was said, would be the law, though the plaintiff may not have known at the time he trusted the company, that the defendants could be reached.*"

In Stufflebeam v. De Lashmutt, 83 Fed., 449, the Court says:

"If in this case any creditor, for the payment of whose debt the assessment sued on was levied, had become a creditor after the transfer to De Lashmutt of the shares of stock upon which he is sought to be held the principles of the case of Pauly v. Trust Co. (165 U. S., 605) would apply. In such case it must be said that the creditor acted upon representation that De Lashmutt was a stockholder in extending his credit to the corporation; and in that case, whatever equities there might be as between De Lashmutt and the persons from whom he took the stock these would not avail the defendant as against the innocent creditor who dealt with the corporation without knowledge of these equities."

"In this case, De Lashmutt bought his stock only twenty days before the failure of the bank, and "it was *not claimed that any debt of the corporation was created between the time of the transfer and the levying of the assessment, so that, so far as the creditors of the bank are concerned, they had not been affected by the transfer.*"

In Latimer v. Bard, 76 Fed., 536 to 541 after citing Upton v. Tribilcock, and Sanger v. Upton, the Court says:

"These defendants allowed themselves to be held out as shareholders of the bank and under the laws as liable to creditors to the extent of the amount of stock held by them. * * * Relying upon this security, depositors trusted the bank and it became indebted to divers persons in such large amounts that at least seventy-five per cent. of the capital stock (besides all the other assets of the bank,) is required to pay them, (540).

By their conduct they influenced persons to their injury. They ought, therefore, unless some controlling principle of law is violated, to be held to the liabilities to which they have apparently been subject. But it is said they are not bound because they did not know the facts relied upon now as a defense until the failure of the bank and after the assessment was made by the comptroller against them and because they could not by reason of the fraudulent conduct of the affairs of the bank, by the exercise of ordinary care have ascertained such facts sooner. I do not think they can be heard to excuse themselves in this way. They ought to have been more diligent in ascertaining and knowing the facts. * * * * * * * * *

They admit that they did, in fact, discover the truth after they were called upon to respond to their apparent liability.

This admission shows that the discovery was not only possible, but that when their financial interests required attention they were able to discover the facts of the case."

This is especially applicable in view of the facility with which Hood and Lantry discovered the alleged frauds by an inspection of the books and papers of the bank, after they received permission from the comptroller. All that the books and papers disclosed then, they would have disclosed earlier, if properly examined. Their answer shows [Record p. 14] that, even before their purchase of stock, there were other stockholders threatening to *expose the actual condition of the bank.* Was the diligence of these shareholders superhuman, or were Hood and Lantry and their two expert bank examiners simply negligent?

In Tillinghast v. Bailey, 86 Fed., 46, Clark, J., says:

"Nor is it any answer to say that if the plaintiff in the case does not show that any particular creditor relied on the increased stock and the

payments made thereon by the defendants and was deceived thereby. The public in dealing with these banking associations do not rely except upon public, known facts in regard to the associations, and the public are not supposed to be familiar with or rely on the facts of a particular case as between the shareholders and the bank. A rule which exacted any such condition as this would practically deprive innocent creditors of any remedy." (p. 48.)

In Hurd v. Kelley, 78 N. Y., 588, 597, the Court says:

"It would be gross injustice to permit the defendant after having *aided the bank to procure credit with the community to avoid as against depositors and creditors the payment of his bond* on the allegation that the exact condition of the bank was not disclosed to him, or that it was much worse than represented.

"The dealings between (defendant) and the officials of the bank at whose request he signed the bond, ought not in justice to be allowed to offset the security given by him for the protection of those dealing with the bank, and *who must be presumed to have relied thereon in their dealings.*"

For nearly eight months the defendants were publicly held out as stockholders of the bank, and all the world invited to extend credit to it on the faith of their being such. The very object of getting them in as shareholders, as the defendants admit, was to strengthen the credit of the bank and get new depositors. Under the circumstances they are estopped from denying, as against new creditors and old creditors continuing business with the bank and suffering loss thereby, that *they are stockholders.* In equity the rights of such creditors are superior to their rights as defrauded shareholders, and they cannot escape their legal liability. This is made clear by the authorities cited.

Most of the cases cited by counsel for plaintiff in error on this point are readily distinguished from the case at bar. They may, however, be more appropriately considered in connection with the demurrer to the cross petition.

Whatever comfort plaintiffs in error might otherwise have derived from the dissenting opinion in Duffield v. Barnum Iron & Wire Works, 65 Mich., 293, is denied them by the later decision, by a unanimous court, in Bissell v. Heath, 98 Mich., 472, 474, 476. In that case the Michigan court recognizes fully the principle that the equities of creditors are superior to those of stockholders who seek to rescind their stock subscription, on the ground of fraud, after the company has failed.

We have not regarded the statement,

"That no part of the original capital stock of said bank was ever actually paid for as required by the banking laws of the United States, nor was any part of the reduced capital stock of two hundred and fifty thousand dollars ($250,000) ever paid for. That said capital stock had, in many instances, been issued to irresponsible parties and worthless notes taken therefor." (Record pp. 11 and 12.)

as intended to set up an independent defense to the action, but have treated it as only one of the many instances of the deception which was practiced on Hood and Lantry, and in this we are justified by the statement of counsel for plaintiffs in error. (See their brief, p. —.)

Judge Phillips effectually disposes of any claim that such irregularities in the organization would constitute a defense to this action, in his opinion (89 Fed., pp. 18 to 22), and so does the Circuit Court of Appeals for the Eighth Circuit, in Scott v. Latimer, 89 Fed., 845 to 851.

The Second Defense.

The defense incorporates by reference all of the allegations of the first and adds a statement to the effect that the bank purchased its own stock from dissatisfied stockholders with the funds of the bank in violation of the law (Revised Statutes § 5201) and that this stock so purchased was the stock afterwards sold and transferred to Hood and Lantry. Of course, the adjectives "pretended," "alleged" and "attempted" are used, to save the question as to whether there was any valid transfer, and counsel for plaintiffs in error contend that the purchase by the bank was *ultra vires* and therefore *void*, that it therefore had no stock to transfer and that defendants acquired none and therefore are not and never were stockholders in the bank.

This raises the only question not already discussed.

The cases they cite go to show that where a bank purchases stock which it had no right to buy, it may disaffirm the contract and refuse to pay calls and assessments upon it and its receiver may also disaffirm the contract and sue to recover the money paid out on such *ultra vires* purchase, but these were cases where the bank still retained the stock in its possession. They cite no case in which the bank has parted with the stock so acquired to a *bona fide* purchaser, and we challenge them to produce a case in which it is held that the subsequent purchaser of such stock acquires no title.

We find, on the contrary, that the exact question was raised and

decided adversely to their claim In re Reciprocity Bank 22 N. Y., 9, 16, 17. In that case Chief Justice Comstock says.

"The objection to the apportionment of liability urged by this class of appellants is, that *the bank could not, in the manner stated, legally become the purchaser or owner of its own stock, and therefore that these persons could not and did not acquire a derivative title from the bank.* In support of this objection the statutes have been referred to, which impose restraints upon the specially chartered banks in this State, in respect to dealing in their own stock (1 R. S., 589). We think it unnecessary to inquire whether the purchase by this bank of shares of stock under the circumstances above mentioned, falls within these restraints. Assuming that the bank owned the stock, the directors caused it, or a portion of it to be sold to Alexander and others. They became actually the purchasers, and they voluntarily suffered their names to appear as stockholders on the books. They cannot in this proceeding" (a suit to enforce stockholders' liability), "impeach their own title. * * * if a party makes an actual purchase of shares, whether from the bank or an individual holder, and voluntarily allows himself in this manner to be represented to the world as a stockholder, he must take the responsibilities of the situation. He comes within the terms of the policy of the act. Equities may exist between him and other parties; the shares may be in dispute; they may be claimed by some one else in hostility to his own right. The statute has no regard to such questions. The person who has caused or allowed his title to be registered on the books cannot deny the truth of that representation and disavow the ownership when it ceases to be a benefit and comes to be a burden."

In Belknap v. Adams, 49 La. Ann., 1350, defendants had received as a donation from the company their proportion of certain shares of its own stock purchased by the company, from another stockholder. The Court says:

"It is urged on us by the defendants that the one hundred and fifty shares had been paid for by the subscribers to whom it had issued before the increase: that the stock was purchased by the company and hence defendants, the sole corporators, had the right to divide it without any resulting liability to creditors. * * * *

"We have in this case the division of purchased stock, which by the purchase, was canceled and remained canceled for all purposes, until reissued. This is the well-defined result when the corporation purchased its stock. The purchase is an unauthorized use of corporate funds. * * * * In our view the defendants incurred the liability of shareholders when they took the fifteen thousand dollars of the stock purchased and afterwards reissued to them by the corporation, and that liability subsists in favor of the creditors." [1352, 1353.]

In National Pemberton Bank v. Porter, 125 Mass., 333, an

effort was made to defeat the action of the bank on a promissory note which it purchased from an indorsee contrary to the statute; the Court said, (p. 334):

"What is the contract which is said to be *ultra vires?* Not the contract in suit, but another contract, to-wit, the contract with Benyon, who is not in any sense a party to the contract in suit, nor is it necessary to the maintenance of this action to connect him with it. The contract with Benyon, assuming such a contract to have been made, and, for the purposes of this discussion, assuming it to have been *ultra vires*, is not executory; this suit is not to enforce it, but it has been fully and completely executed. It is true that the contract with Benyon was one of which the contract in suit was the subject matter. The question then arises, can a party to a contract in itself lawful and into which all the parties to it had authority to enter, be made null or be incapable of enforcement, because the plaintiff has entered into and fully performed, with another and totally distinct party, a contract in reference to it which was unauthorized, even though by such contract he becomes a party to the contract in suit?"

And the court answered this question in the negative.

In Holmes, etc., Co. v. Holmes & Wessel Metal Co., 53 Hun., 52, 57; S. C., 127, N. Y., 252, 260, plaintiff sued on a note given for stock of the defendant company, which it had four years before received in payment for its business and plant, and the plea was interposed that the plaintiff had no power to take the stock. The court said (p. 260): "To hold that the plaintiff could not dispose of the stock would deprive it of the consideration received for the transfer of its rolling mill and material, thus accomplishing a wrong and not advancing justice."

The stock in this case belonged to the original issue and was valid. The case, therefore, differs radically from the cases cited, in which corporations issued stock in excess of the limits of their charter. Purchasers of such over-issued stock have almost invariably been denied the rights of stockholders, and the transactions are void because the subject matter of the transactions is a nullity. Not so, however, with valid stock. The object of the statutes prohibiting banks from purchasing and holding their own stock is to prevent the extinction of stock once regularly issued, and the withdrawal of that much capital.

Bank v. Lanier, 11 Wall., 374, 375.
Bank v. Stewart, 107, U. S., 676.

While the bank holds the stock such reduction of capital would be effected, unless it or the receiver were allowed to pursue the person from whom it purchased the stock, as in Burrows v. Niblack, 84 Fed., 181. But when the bank has resold the stock to a *bona fide* purchaser and has received the money for it, as in the case at bar, the capital is restored and the object of the statute is fully satisfied. In such case no one but the government has a right to complain. The title of the purchaser is valid as against all the world. The original holder has received his consideration for it and can not reclaim it. The creditors of the bank are not defrauded because the capital has been restored. The purchasers can not complain because they have received valid stock for which they bargained.

In National Bank of Xenia v. Stewart, 107 U. S., 676, Justice Field said, in passing upon the very section of the national bank act, on which plaintiffs in error rely:

"While this section, Section 5201 R. S., in terms prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged againt the validity of the transaction by any one except the government, *it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere in the matter.* * * Supposing it was unlawful for the bank to take those shares as security for a loan, it was not unlawful to authorize the bank to sell them when the contingency occurred. The shares being sold pursuant to the authority the proceeds would be in the bank as his property."

To paraphase Justice Field's dictum:

Supposing it was unlawful for the bank to purchase these shares, it was not unlawful for the bank to sell them. The statute expressly provides that stock acquired by a bank shall be "sold or disposed of at public or private sale." The shares being sold, the proceeds would be in the bank, its capital restored and the rights of creditors unaffected.

As was said by Justice Swayne in National Bank v. Matthews, 98 U. S., 626:

"The intent, not the letter, of the statute constitutes the law.

A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture."

And again:

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." * * * *

"So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found." (p. 628.)

And again:

"We cannot believe it was meant that stockholders and perhaps depositors and other creditors should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress." (p. 629.)

And the court held that the bank was entitled to enforce a trust deed taken, in violation of the statute, to secure a contemporary loan. This was expressly affirmed in National Bank v. Whitney, 103 U. S., 101, 102.

In Reynolds v. Crawfordsville Bank, 112 U. S., 405, 413, an action by the bank to quiet title to real estate purchased by it, some of which had been mortgaged to it to secure a debt and some not, it was objected that it was contrary to law for the bank to make such purchase.

The Court says:

"But if there was any force in this objection to the title it could not be raised by the debtor, for where a corporation is incompetent by its charter to take a title to real estate a conveyance to it is not void but only voidable; the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

See also Fortier v. New Orleans Bank, 112 U. S., 439, and Thompson v. St. Nicholas Nat. Bank, 146 U. S., 240, 251, in which National Bank v. Matthews, and National Bank v. Whitney are expressly affirmed, and Smith v. Sheeley, 12 Wall., 358, 361.

Mr. Justice Hunt, passing upon another statutory prohibition in Gold Mining Co. v. National Bank, 96 U. S., 642, said:

"We do not think that public policy requires, or that Congress intended, that an excess of loans beyond the proportion specified

should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders and all who have an interest in the safety and prosperity of the bank."

Nothing is urged, for or against, the bank in this suit. It is not asked to affirm or disaffirm the contract of purchase. The interests of creditors alone are involved, and surely a court of equity will not allow the purchasers and present holders of stock to annul their own purchase and defeat the rights of creditors because the bank did something which it ought not to have done.

The case is analogous to those in which deeds from corporations or aliens prohibited by law from purchasing and holding real estate, or from holding beyond a certain time, have been held to give a good title to *bona fide* purchasers, defeasible only by the State if at all.

See Banks v. Poitiaux, 3 Rand. (Va.). 136, 142.
Rutland, etc., Ry. Co. v. Proctor, 29 Vt., 93, 97.
Leazure v. Hillegas, 7 S. & R., 313, 322.
Runyan v. Lessee of Carter, 14 Pet., 122, 131.
Hickory Farm Oil Co. v. Buffalo, etc., Ry. Co., 32 Fed., 22.
Telegraph Co. v. Telegraph Co., 22 Cal., 398, 431.
Water Co. v. Clarkin, 14 Cal., 544, 553.
Tarpey v. Deseret Salt Co., 5 Utah, 494, 502.
Silver Lake Bank v. North, 4 Johns. Ch., 370, 373.
Land v, Coffman, 50 Mo., 243, 254.

Our conclusion is that if the law prohibits the purchase and holding of its own stock by a bank, its policy will also require the earliest possible disposition of the stock and restoration of capital, and its spirit is carried out when, as in this case, a sale is made to a *bona fide* purchaser and the bank receives the par value of the stock.

The bank may be punished for purchasing its own stock by forfeiture of franchise and being put in the hands of a receiver, but its creditors will not be punished by allowing subsequent holders of this same stock to escape their statutory liability.

The demurrer to the second defense should be sustained.

The Cross-Petition.

The cross-petition incorporates, by reference, all of the allegations of the first and second defenses, and adds that "by reason of the facts stated, and the fraud and deceit practiced upon him by the said Missouri National Bank of Kansas City, Missouri, and its officers, he, the

said defendant, has been injured to his damage in the sum of twenty thousand dollars ($20,000), with interest thereon from the 18th day of April, 1896; that he has presented such claim to the plaintiff herein as such receiver, for allowance as a claim against said bank, and that the same has been rejected and refused by the plaintiff as such receiver," and prays for judgment against the said Wallace as receiver for the said sum of $20,000, with interest from the 18th day of April, 1896, the day he purchased said stock.

The demurrer to this cross-petition is based upon four grounds.

If this "cross-petition" be considered as a proceeding for rescission of contract, cancellation of stock certificate and recovery of money paid out under the contract on the ground of fraud, it is essentially an equitable proceeding, and the discussion of the first and third demurrers to the first defense is applicable to it. We need not repeat it here.

If, on the other hand, as appears from the prayer, it is an action at law for damages for the deceit practiced upon plaintiff in error by the bank, the second and fourth grounds for the demurrer are well taken.

II.

Said "cross-petition" is based upon alleged frauds which were not committed by plaintiff or the creditors whom he represents in bringing this action, but were, as alleged, committed by the Missouri National Bank, which is not a party to this action, and an off-set or counterclaim against the bank itself cannot properly be set up by the stockholder in an action brought by the receiver to enforce the statutory liability of the stockholder.

IV.

Said "cross-petition" does not state facts sufficient to constitute a counter claim in favor of defendant and against plaintiff, or to entitle defendant to any relief as against plaintiff.

Plaintiffs in error have no claim against the creditors or the receiver. They have asserted a claim which, if established, is good only against the bank. The *bank* is not asserting any claim against them in these suits, nor is the receiver asserting any claim *which the bank had* against them. It is as though A. has sued B. and B. had answered, I admit your claim to be good, but I have a claim against C. for getting me into the position which made your claim good. Such a claim cannot be asserted by a defendant, even under the Kansas code. The argument that this claim for damages for deceit practiced by the bank comes under §95 of the Kansas code strikes us as far-fetched and fanciful in the extreme. The receiver claims that Hood and Lantry were shareholders at the time the bank failed; that their statutory liability then attached; and that they must pay the assessment upon their stock made by the comptroller for the benefit of creditors. They answer, we were cheated by the bank when we bought this stock, eight months before the bank failed and this liability attached. Plaintiff did not cheat us; the creditors did not cheat us; we had no contract, or transaction with them; they had no existence, as such, at the time we bought the stock; their claim is founded on a statute to which the comptroller alone can give effect; but the bank cheated us and we want to set up a little claim of our own against the bank.

How can it be said that such a claim is one "existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action and arising out of the contract set forth in the petition?"

As has been declared over and over again, *the receiver does not represent the bank* in bringing this action. The bank is not represented in the case, any more than T. B. Wallace, individually, is represented. The capacity in which he sues is distinct and must be kept in mind. He represents *creditors* and *creditors only*—in this action. What had *they* to do with the original contract of purchase? What judgment can be had against *them?* What connection is there between the fraud of the bank, which is the basis of the cross-action on behalf of creditors and the action of the comptroller, which constitutes the basis of plaintiff's action? The claims are not mutual and cannot be offset against each other. The bank and its officers are not parties to the suit and can take nothing by it. They are, however, necessary parties to the determination of the question of fraud said to have been practiced by them and should have their day in court before judgment is awarded.

Western National Bank v. Armstrong, 152 U. S., 346, 354, 355.

In Houldsworth v. City of Glasgow Bank and Liquidators, 5 Ch. App., 387, the leading case in England on this subject, it was held that a person induced to buy stock in a banking association by fraudulent misrepresentations of its directors, could not, after the failure of the bank, maintain an action for damages against the liquidators (corresponding to the Receiver in our case) or against the bank.

Earl Cairns, L. C., said in deciding the case:

"I will assume that the allegations of frauduleut misrepresentations are such as that if the bank had been a going concern the appellant would have been entitled to rescind his contract and to have recovered back all sums paid in respect of his shares. The Court of Session has been of opinion that even although the averments amount to what I have stated, still they afford no ground for an action against the liquidators and they have dismissed the action. In my opinion the court is right. It was admitted before your Lordships, as indeed it could not be denied, that after the winding-up of the company commenced it was too late for the appellant to repudiate his stock, and that he must remain, as the liquidation found him, a partner in the bank and a contributory as such.

* * * It appears to have been contended in the court below that the appellant might be unable to maintain the present action as a claim in the liquidation to be satisfied *pari passu* with other creditors, and yet might be able to maintain it as a claim against shareholders in the company after all other creditors were satisfied. * * *

I am satisfied there is no foundation for it. [322, 323.]

"A man buys from a banking company shares or stock of such an amount as that he becomes, we will say, the proprietor of one-hundreth part of the capital of the company—a representation is made to him on behalf of the company that the liabilities of the company are £100,000 and no more. His contract, as between himself and those with whom he becomes a partner, is that he will be entitled to one-hundreth part of all the property of the company, and that the assets of the company shall be applied in meeting the liabilities of the company contracted up to the time of his joining them whatever their amount may be, and those to be contracted afterwards, and that if those assets are deficient the deficiency shall be made good by the shareholders rateably in proportion to their shares in the capital of the company. This is the contract and the only contract, made between him and his partners, and it is only through this contract and through the correlative contract of his partners with him that any liability of him or them can be enforced.

It is clear that among the debts and liabilities of the company to which the assets of the company and the contributions of the shareholders are thus dedicated by the contract of the partners, a demand that the company, that is to say, those same assets and contributions shall pay the new partner damages for a fraud committed on himself by the company, that is, by himself and his co-partners in

inducing him to enter into the contract which alone could make him liable for that fraud, cannot be intended to be included. Any such application of the assets and contributions would not be in accordance but at variance with the contract into which the new partner has entered."

* * * * * * * *

"If he succeds in that action this £4,000 will be paid out of the assets and contributions of the company. But he has contracted, and his contract remains, that the assets and contributions shall be applied in payment of the debts and liabilities of the company, among which, as I have said, this £4,000 could not be reckoned. The result is, he is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide; in other words, he is in substance if not in force, taking the course which is described as approbating and reprobating, a course which is not allowed either in Scotch or English law." [324, 325.]

The opinions of the other Lords are equally full and interesting, and the sum of the whole is that the only remedy of a person induced by fraudulent misrepresentations to purchase stock in a banking company is to rescind and tender back his stock before the company fails, or to bring his action of damages against the persons deceiving him. He cannot, after a failure of the bank, bring his action against the liquidators and recover *pari passu* with creditors of the bank, much less offset his claim against his liability as a stockholder.

In the case at bar it is not necessary to go so far, or to decide that plaintiff in error has no remedy against the bank or his fellow stockholders. It is only necessary to decide that he cannot, in this action, offset his claim for damages against his stockholder's liability, nor can he be permitted in an action to which the bank is not a party to recover a judgment against the bank which would entitle him to share *pari passu* with the bank's depositors in the assets of the bank.

These points have been considered and a very instructive opinion has been furnished by Judge Shiras, in the recent case of Sheafe v. Larimer, 79 Fed., 921, 923 to 924.

We quote from the syllabus:

"Where, upon the petition of a receiver of a State bank, an order has been made authorizing an assessment upon the capital stock of the bank under a statute authorizing such assessment (identical with the provision in the National Bank Act), the order is binding upon stockholders and cannot be collaterally attacked by them, although they were non-residents and not before the court.

"In such an action the defendant cannot plead as a counter-claim a claim for damages against the bank for false representations made at

the time he bought the stock, the bank not being a party to the action."

And from the opinion:

"Although the defendant set forth in the answer the facts relied upon as constituting false pretenses, a *rescission of the contract of sale is not prayed for, nor could it be properly sought for in this action, the same being at law.*" (p. 923.)

"The answer admits that in fact the defendant since October 1, 1891, has been a stockholder in the bank, but avers in substance, that he was induced to become a stockholder by means of certain false representations made to him by the president of that bank. The defendant has not sought nor secured a rescission of the contract of purchase of the stock by a degree in equity and he, therefore, is yet legally a stockholder and subject to the liabilities of a stockholder. The remedy sought in this action by the defendant is a judgment for damages and this is sought in the form of a counterclaim against the plaintiff and against the bank. The latter was not a party to the suit as originally brought and has not been served with notice, nor has an appearance therefor been entered. So far as the record now shows, the counterclaim is pending against the receiver only and I can see no ground for holding that the counterclaim can be sustained against the rights represented by the receiver in this case. The cause of action, if any exists, does not arise out of any acts of the receiver. * * * It is a claim for damages against the bank and it is open to the defendant to sue upon the claim for damages, and if judgment in his favor is obtained to file the claim as a debt with the receiver; but it cannot be availed of as a counterclaim against the receiver in the present action. (923–4). * * * * *

A stockholder cannot be permitted to set-off a debt due from the corporation to him, as against his stockholder's liability as that would be in effect to give him a preference over all creditors of the bank." (924–5).

Counsel for plaintiffs in error are, naturally, dissatisfied with this opinion and argue that it is unsupported by authority, is a mere *dictum*, etc. (brief p. —.) They cite passages from text books and numerous authorities to show how many remedies a party defrauded may pursue against the fraud feasor, but not one of them is to the point. Not one of them asserts the right of a stockholder, who has been induced by fraudulent representations to purchase his stock, to set up a counterclaim based on such fraud in a suit of this kind brought to enforce the stockholder's liability. Judge Shiras' opinion is supported by the authorities we have already cited and by the following:

Sawyer v. Hoag, 17 Wall., 610, 622.
Handley v. Stutz, 139 U. S., 417, 437.

Hobart v. Gould, 8 Fed., 57.
Wingate v. Orchard, 75 Fed., 241, 244.
Bausman v. Kinnear, 79 Fed., 172, 174, 175.
In re Empire City Bank, 18 N. Y., 199, 227.
Williams v. Traphagen, 38 N. J., Eq. 57.
Shickle v. Watts, 94 Mo., 410, 418.
Carbon Co. v. Mills, 78 In., 460, 465.
Thompson v. Bank, 19 Nev., 103, 114.
Buchanan v. Meisser, 105 Ill., 688, 643.

In Sawyer v. Hoag, 17 Wall., 624, the Court said, (to enable a party to make a set-off):

"The debt must be mutual; must be in the same right. The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally to all the creditors and could not be appropriated by the debtor to the exclusive payment of his own claim."

In Handley v. Stutz, 139 U. S., 437 the Court said:

"Under the case of Sawyer v. Hoag, 17 Wall., 610, Neely was clearly not entitled to set-off against the claim of the creditors his own claim against the corporation."

In Hobart v. Gould, 8 Fed., 57, Judge Nixon sustained a demurrer to a plea that the bank was indebted to the defendant in a sum in excess of the assessment and said, among other things:

"The demurrer raises the question whether such set-off is allowable; *i. e.*, whether a stockholder of a national bank, who happened also to be a creditor may cancel or diminish his assessment by off-setting his individual claim against the association. Considering the ends plainly in contemplation by the foregoing provisions of the statute, it would seem, upon principle, that no such escape from liability should be permitted by the shareholder. * * * *

"Besides, the right to a set-off in pleading is a creature of the statute, and applies only to mutual dealings and no such relations exist between the parties here. The liability to be enforced against the shareholder is not a debt due to the bank, but is a sum of money equal to the par value of his stock payable by him to the receiver as an officer of the government by force of the law and the assessment authorized and made by the comptroller."

In Wingate v. Orchard, 75 Fed., 241, the Circuit Court of Appeals of the Ninth Circuit refused to allow a stockholder to off-set

the amount of his deposits in the bank, and distinguished the case of Scott v. Armstrong, 146 U. S., 499.

In Bausman v. Kinnear, 79 Fed., 172, 174, the same court said:

"The unpaid stock is held to be a trust fund for the purpose of paying the debts of the corporation, and as such it must be distributed among the creditors *pro rata*. The debt due to a stockholder is entitled to no preference over other debts, and he cannot require its payment, by way of offset, to the exclusion or postponement of other claims. The reason usually assigned for this rule is that the debt owing by the stockholders to the corporation after insolvency, and that owing from the corporation to him, are not in the same right, the former being a debt payable to a trust fund. The decisions upon this proposition appear to be unanimous."

Cases Distinguished.

We do not dispute the right of a party defrauded to set up his counter-claim for damages in a suit brought against him by the other party to the contract; nor do we claim that insolvency and the appointment of a receiver for the other party will prevent his setting up such claim in an action by the receiver upon the same contract. We accept the cases cited by plaintiffs in error on these points as fair statements of the law.

The following cases, not so readily classified, are easily distinguished from the case at bar:

In Welles v. Stout, 38 Fed., 807, 810, Judge Shiras held that a set-off or counter-claim might be allowed in a suit by the receiver to enforce the stockholders' liability, where defendant laid claim to a special fund held by the bank in trust for a specific purpose, which fund had come into the hands of the receiver and in which the general creditors had no right. The reason for denying the right of set-off did not, in his judgment, apply to that case, for the claim was "*of such a nature that the holder thereof is entitled to receive the full amount thereof from the receiver before distribution in the way of dividends can be made to the general creditors.*" (p. 810.)

The same judge rendered the decision in Sheafe v. Larimer, 79 Fed., 921, showing that he had the distinction clearly in mind.

Zang v. Adams, 23 Col., 408, was a suit on a promissory note given to the bank, and the defense was a want of consideration for the note "arising out of the fraud of the company and no rights of innocent holders were involved." It was not a suit to enforce stockholders' liability.

Savage v. Bartlett, 78 Md., 561, was a suit for balance due on a stock subscription; not a suit to enforce stockholders' liability. Defendant subscribed for his stock July 7, '90, repudiated his contract January, '91, and the company made an assignment in April, '91.

The decision turned, in part, on the fact that defendant rescinded his contract before the assignment and, in part, upon the fact that the laws of Maryland do not provide for a registry of stockholders. (p.607.)

Florida Land & Improvement Co. v. Merrill, 52 Fed., 77, 81, and Robinson v. Dickey, 14 Tex. Civ. App., 70, 73, were suits in equity to rescind contracts of sale and to recover possession of real estate on the ground of fraud. In neither case was there an action to enforce stockholders' liability, and the court in each case disclaimed the right to interfere with any assessment on the stock of the bank which might be necessary to pay debts.

In Newton National Bank v. Newbegin, 74 Fed., 135, Newbegin brought suit to recover an amount paid by him for increased stock which was unauthorized and, therefore, void. In addition to this, the creditors agreed, after the suspension of the bank, to an extension of time and reorganization of the bank, while Newbegin's suit was pending, thus waiving their equities as against him.

In Stufflebeam v. De Lashmutt, 101 Fed., 357, the defendant set up in an amended answer that, in a suit brought by him in the state court against the president and secretary to rescind the contract of purchase by which he became possessed of stock and to compel a reconveyance of land deeded to the president in payment of the same and by him to the secretary, on the ground that the contract was induced by fraudulent misrepresentations, he obtained a decree in his favor. The court distinguishes the case from Lantry v. Wallace, 97 Fed., 869, (p. 371) and says: "The bank was insolvent at the time of his purchase and was closed by the Comptroller of the Treasury [sic.] so it is alleged some twenty days thereafter." * * * *

"I think the inference is warranted that no one other than the defendant himself was in any way prejudiced by the defendant's purchase of stock. It is not a question as to which of two innocent persons shall suffer loss." * * * * *

"The fact that De Lashmutt has a right to rescind his contract with Brune and compel a reconveyance of the land conveyed to the latter does not determine the question of the former's liability to creditors as a stockholder. De Lashmutt's right to relief against Brown and Brune is one thing; his liability to the creditors of the bank another." (372.)

Conclusion.

We submit that there is nothing in the voluminous argument of counsel for plaintiff in error, or in the authorities cited by them, to shake the general doctrine as applied by the court below.

We think that the following propositions of law are conclusively established by the authorities and that they are fatal to the contention of plaintiff in error, viz:

1. In an action of law brought by the receiver of a National Bank to recover the amount of a stockholder's liability, the stockholder cannot interpose the equitable defense that he was induced by the fraudulent misrepresentations of the bank's officers to purchase the stock.

2. It is not a defense to such an action that the stock held by the defendant was purchased by the bank from original stockholders, contrary to the statute, and then sold and transferred to defendant.

3. Whether or not defendant has a right of action for damages against the bank after its failure, for the fraudulent misrepresentation of its officers, he cannot set off the amount of his claim against his stockholder's liability, or recover judgment in a suit to which the bank itself is not a party.

Respectfully submitted,

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W. H. WALLACE,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 179.—October Term, 1900.

Calvin Hood, Plaintiff in Error, *vs.* T. B. Wallace, as Receiver of the Missouri National Bank of Kansas City, Missouri.	In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 27th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

The pleadings in this case are the same as in *Lantry* v. *Wallace*, just decided. The demurrer to the answer and cross-petition of Hood was sustained in an elaborate opinion by Judge Phillips, holding the Circuit Court. 89 *Fed. Rep.* 11. The judgment in that court was affirmed in the Circuit Court of Appeals. *Lantry* v. *Wallace*, 97 *Fed. Rep.* 865.

For the reasons stated in the opinion just rendered in *Lantry's* case, the judgment in this case is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 180.—October Term, 1900.

C. J. Lantry, Plaintiff in Error,
vs.
T. B. Wallace, as Receiver of the Missouri National Bank of Kansas City, Missouri.

In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 27th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

This action was brought by the receiver of the Missouri National Bank of Kansas City, Missouri, under section 5151 of the Revised Statutes, providing that the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.

The case was determined in the Circuit Court upon demurrer to the answer and cross-petition of the defendant Lantry, and the action of the court in sustaining the demurrer and giving judgment for the plaintiff was affirmed in the Circuit Court of Appeals, Judge Thayer delivering the opinion of the court. 97 *Fed. Rep.* 865. Judge Sanborn dissented for the reasons set forth in his dissenting opinion in *Scott* v. *Latimer*, 89 *Fed. Rep.* 843, 857–862; 60 *U. S. App.* 720, 743–751, which was the case recently decided by this court under the title of *Scott* v. *Deweese*, 181 *U. S.* .

The petition set forth the appointment by the Comptroller of the Currency on the 3d day of December 1896 of the plaintiff Wallace as receiver of the bank. It alleged that at the time of the bank's failure the defendant was the owner and holder of two hundred shares of its stock of the par value of $100 each; that on the 30th of July 1897, it appearing to the satisfaction of the Comptroller that it was necessary to enforce the individual liability of stockholders, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States, that officer made an assessment upon shareholders for $250,000 to be paid by them ratably on or before the 30th of August 1897; and that he had made demand upon stockholders for $100 upon each share of capital stock held and owned by them respectively at the time of the failure of the bank.

The defendant made two separate defenses. In setting out the first defense he denied that he was then or had ever been the owner of the two

hundred shares of the stock referred to in the petition otherwise than as set forth by him.

The case made by the answer of the defendant was substantially as follows:

A short time prior to April 18th 1896 D. V. Rieger, president of the bank, and who had been such from its organization, solicited the defendant and one Calvin Hood to purchase some shares of the stock of the bank and become stockholders. He persistently urged upon them that it was the desire of the bank to have them own its stock and their names connected with it, as they were men of means and had a large business acquaintance in the State of Kansas, and their connection with the bank would be of benefit to it by attracting and securing a large amount of Kansas business otherwise not obtainable.

In the preliminary negotiations for the purchase of the stock Rieger represented that the bank was in a sound, healthy financial condition, free from debts, earning large profits, and paying dividends, and that he was ready and willing to submit to them a detailed statement showing its financial condition.

In consequence of his statements the defendant and Hood called upon Rieger at the banking house of the bank with a view of investigating its condition.

During such preliminary negotiations Rieger continued to act as president of and for the bank, and all statements made by him during the negotiations were made in his capacity as president of the bank, with its knowledge, consent and authority.

The defendant and Hood informed Rieger that they had been induced by him to investigate the condition of the bank with a view of purchasing some of its shares, and they called on him for a full and complete history and detailed account of its business and financial condition. He at once promised to submit to them a faithful statement and history of the bank from its organization, and agreed to submit such statement to any expert bank examiner they might select, if they desired him to do so.

The defendant together with Hood then entered upon such investigation which covered a period of several weeks—Rieger representing at the time that the bank was originally organized with a capital stock of $500,000, all of which had been actually paid for by the subscribers thereto and the money deposited as required by law; that some time in July 1893, on account of the extreme stringency in money matters and panics, the bank suspended, but upon full investigation by the Comptroller of the Currency, and a full report of the national bank examiner submitted to that officer, it was permitted to resume business; that the Comptroller required the bank to reduce its capital stock to the extent of $250,000, to cover any loss it might have sustained previous to that time; and that this left outstanding

the sum of $250,000 of the capital stock, all of which had been actually issued and paid for by the shareholders of the bank at that time.

Rieger submitted to the defendant a report by the Comptroller in support of his statements, which was in words and figures as follows: "This bank [referring to the Missouri National Bank of Kansas City] suspended on the 17th inst., because of the run on the part of its depositors. There was nothing in its condition to warrant this run or occasion suspicion as to its insolvency. It seems to have been prudently managed and its resources are unusually free from items of questionable value, there being no bad debts. The bank is solvent and should be permitted to resume."

He also submitted to defendant a bulletin issued by the Comptroller, dated July 28th 1893, which was in words as follows: "The Missouri National Bank of Kansas City, Missouri, having complied with the conditions imposed by the Comptroller of the Currency, and its capital stock being unimpaired, has this day been permitted to reopen its doors for business. The bank opens with plenty of money on hand, and is wholly solvent and safe."

He represented to the defendant that the statements contained in the above report and bulletin were absolutely true and correct, and that the bank had been frequently examined after it resumed business in July 1893 by bank examiners and experts, who uniformly and truthfully reported the bank in good, healthy and prosperous condition, and entirely free from bad loans or unsecured paper; that all the paper held by the bank was fresh, clean paper and well secured, and that the interest on its securities had been promptly paid, and there was not among its assets a single item or piece of paper that had not been secured or kept alive as provided by the banking laws of the United States. A list of the securities and assets of the bank was submitted to the defendant by Rieger, he stating that each and every item on the list was worth its face value and was fully secured and that the bank was and had been since its organization doing a large and profitable business, accumulating a large surplus and paying an annual dividend of six per cent. to the stockholders.

After defendant received the above statements from Rieger he secured the services of two expert bank examiners to whom Rieger made the same statements and representations about the assets and condition of the bank, thereby inducing them to believe such statements to be true and to so report to the defendant. Relying upon such representations, defendant agreed with Rieger, as president, to purchase certain shares of its capital stock, which the latter represented was the property of the bank, and which he represented had been theretofore acquired in a lawful way, and paid cash therefor, receiving from him "a certificate of stock dated the 18th day of April 1896, and numbered 611, and purporting to be issued by the bank and under its

seal as of that date, and that this certificate represented the two hundred shares of stock which the defendant supposed he was purchasing, being the same stock mentioned and described in plaintiff's petition, for this defendant never at any time nor upon any occasion purchased or attempted to purchase any other stock of said bank for himself, and never at any time received for himself any certificate of stock purporting to be a certificate for stock of said bank other than the said certificate numbered 611." The bank received the money so paid by the defendant for the stock, namely, the sum of $20,000, and the same was for the use and benefit of the bank.

The defendant continued to be the holder of such certificate of stock, without the knowledge or the means of knowing that the bank was insolvent, until on or about the 2d day of December 1896. From the time of its delivery to him the bank was apparently doing a very large and prosperous business, having a daily average of about $1,500,000 deposits, and apparently on an average in good bills receivable about $1,300,000. But owing to the vast number of books and the complicated system of bookkeeping kept by the bank, and the artful manner in which its insolvency was and had been secreted by its officers, no one except the officers having knowledge of its condition could or would have supposed from any investigation made within any reasonable limit of time that the bank was insolvent, or that any bills receivable were fictitious, fraudulent or dead paper, or that any of the representations made by the president of the bank were false and untrue, or that it was the purchaser of a large amount of its own stock.

On or about December 2d 1896 there were rumors of the insolvency of the bank. Immediately after learning of such rumors the defendant began to make the most diligent efforts to ascertain the cause thereof, and to ascertain its actual condition. During such investigation, which was only a day prior to the bank's suspension, its president, cashier and other officers persistently insisted that it was in a good, healthy financial condition, and was perfectly solvent, as they had represented it to be. But the defendant was unable to ascertain at that time any information showing the real and actual condition of the bank beyond the representations of its officers.

On the 3d of December 1896 the receiver of the bank appointed by the Comptroller of the Currency took the actual and exclusive control and possession of the bank and its assets, books, papers and records, and excluded every one, including the officers of the bank and the defendant from the right or opportunity of making any inspection of such books, records, papers or assets. Although repeatedly requested to give to the defendant and his associates an opportunity of making a careful and complete investigation of the affairs and condition of the bank after the same had passed into the possession of the plaintiff as such receiver, the latter persistently refused and denied such request, and after the bank was

placed in the hands of the receiver the defendant called upon him and demanded access to the books, papers and documents of the bank, there being no other source from which he could ascertain the real history of the bank and its business transactions or its real condition. He frequently called upon the receiver and asked him for information as to its real history and actual condition, but the only information he could get from that officer was that the bank was solvent and under his management would pay all of its debts, liabilities and obligations without making any assessment or call upon the stockholders. The receiver continued to make the statement that the bank was in a solvent condition, up to the time the order of assessment was issued by the Comptroller as alleged in the petition. By reason of the statements and representations made by the receiver the defendant was led to believe and did believe that the bank was solvent and would pay all its obligations, and that its embarrassments were due to the complication of business matters and would only be temporary.

The defendant also alleged in his answer that on or about September 1st 1897, upon repeated requests, the Comptroller gave to defendant and his associate Hood permission to inspect the assets, books and records of the bank, and to secure all information possible as to its actual coudition, and also permission to see the reports of the examinations made under the direction of the Comptroller and the receiver; and that thereupon for the first time after the appointment of the receiver the defendant was permitted to and did make a careful and thorough examination into the actual condition and affairs of the bank; that as a result of that investigation defendant for the first time ascertained the actual condition of the bank and its affairs, and for the first time learned that the representations made by Rieger about its condition were knowingly false, fraudulent and untrue, and were made by him as president of the bank with full knowledge of the bank and the directors and the managers thereof that they were false, fraudulent and untrue and for the purpose of inducing the defendant and Hood to invest in the capital stock of the bank;

That at no time after its organization in 1891 was the bank solvent or able to meet its debts; that no part of its original capital stock was ever actually paid for, as required by the banking laws, nor was any part of the reduced capital stock of $250,000 ever paid for; that the stock had in many instances been issued to irresponsible parties and worthless notes taken therefor; that at the time the bank was represented by Rieger to be in good, sound financial condition it had on hand and included as part of its good assets fraudulent, fictitious and worthless paper greatly in excess of its capital stock; that there was at the time fraudulently concealed and covered up in paper represented to be good $50,000 of Rieger's personal indebtedness absolutely worthless; and that the bank never from its

organization earned a dividend, but had paid out on dividends over $70,000 in order to conceal and cover up its actual condition; that Rieger when he made the above representations knew the stock to be absolutely worthless and that the capital stock had never been properly issued or paid for; that a large portion of the stock was claimed to be owned by the bank, and that the bank had on hand notes and paper that were fraudulent, fictitious and worthless in a greater amount than its entire capital stock; and that with full knowledge of its absolutely insolvent condition he represented the bank to be in good condition in order to induce defendant to purchase the two hundred shares of the capital stock and defraud him of the $20,000; that at the time of such purchase the defendant believed the statements made to him to be absolutely true in every particular, and was governed by them in such belief; but that such stock was not at any time of any value whatever;

That by reason of the facts above stated and set forth no consideration was ever received by the defendant from the bank for the payment of the $20,000 at the time of the purchase of said stock;

That immediately after the investigation permitted by the Comptroller, and on or about the 27th of October 1897, he called at the banking house of the bank, where its affairs were being adjusted by the receiver, but finding only the receiver in possession and custody of the bank, its assets, books, records and affairs, and being unable to find any officer of the bank, he tendered to the receiver said certificate of stock numbered 611, above referred to, for cancellation, notifying and informing him that because of the fraud and deceit that had been practiced upon him, he disaffirmed the contract of purchase or pretended purchase of stock, and demanded that the receiver receive the certificate, cancel it and repay to the defendant the sum of $20,000 paid by him as above stated, or such proportionate part thereof as he would be entitled to receive as a creditor of the bank for that amount; but such tender and demand the receiver refused to accept or accede to; and,

That from the time the bank went into the hands of the receiver until the filing of the answer there had not been any officer of the bank living or residing in Missouri upon whom any service of summons or other process could be had in any suit that might have been commenced against the bank in Missouri, save and except only the receiver as representing the bank, and that since December 3d 1896 the bank had no usual place of business whatever in Missouri where process could be left or served upon any person conducting the bank's business, save and except as process might be served upon the plaintiff as such receiver.

For a second and further defense the defendant alleged that prior to and during the negotiations with him and Hood, the president, cashier and other officers of the bank, knowing well its insolvency, purchased or pre-

tended to purchase from stockholders or alleged stockholders, with the funds of the bank, shares of its outstanding capital stock in order to prevent exposure by the stockholders owning such shares of its actual condition and the threatened throwing of such shares on the market at prices that would advertise the bank's insolvency; that in order to prevent an open and apparent violation of law, as well as to deceive the public and the Comptroller of the Currency and his associates and employees, the officers of the bank engaged in this transaction and in transactions of buying or attempting to buy such shares of its own stock so outstanding, would cause the certificates of stock purchased or pretended to be purchased from the parties holding the same to be endorsed by those to whom the certificates were issued, either in blank or in the names of the president, cashier or some one of the clerks or other parties connected with the bank, and would then procure a delivery of such endorsed certificate, paying for the same with money belonging to the bank, or by surrendering notes held by it against such parties for such stock, or by payment of money and surrender of notes; that then to account for the funds so used, the parties to whom the certificates would be assigned, or whom the bank pretended were the owners of them, would make a promissory note or notes to the bank for the amount of money used in the purchase of such stock, such note or notes being payable to the bank and unsecured except as the certificates of stock were issued to secure the same; that all stock purchased or attempted to be purchased by the officers of the bank was paid for out of its funds and notes taken from its officers, agents and servants to the bank to represent the funds so used;

That each and every one of the persons engaged in this transaction and who executed any or all of the notes referred to was at the time and ever since had been absolutely and hopelessly insolvent, to the full knowledge of every officer of the bank engaged in these transactions; that such pretended or attempted purchase of shares of stock was made by the bank directly with the owners or holders thereof and with the people in whose names the stock stood, to the knowledge of each one of the persons owning or holding the stock or in whose name it stood, and that none of the transactions concerning the negotiations for the pretended purchase of stock was made to or with the owners, holders or the persons in whose names it stood by any employees in whose names the certificates were taken or to whom the certificates were delivered in blank, except in the case of the president and cashier, who in such negotiations and pretended purchases were, to the knowledge of those with whom they dealt, acting for and on account and in the name of the bank;

That in some instances, and perhaps all, the certificates of stock surrendered to the bank were cancelled, and new certificates issued to irresponsible persons, who were to hold the same for the use and benefit of the

bank; that owing to the fact that the entire history of these transactions, so far as it appeared in writing, was and is contained in the books, records and papers of the bank in the sole custody of the receiver, the defendant was unable to give a more detailed statement and history of the transactions, or to state from whom all the purchases were made, or to whom certificates were assigned, or by whom held, or to whom they might have been transferred;

That none of said stock was taken or purchased or procured by the bank to prevent any losses or loss upon debts previously contracted in good faith or purchased in any way authorized by law, but the same was purchased by the bank with its funds for the purpose of preventing the stock from being sold in open market, and to prevent any investigation being made as to the actual condition of the bank by the parties owning the same; that none of the parties to whom new certificates of stock were issued have paid anything for it, nor did they pay or cause to be paid the notes executed to the bank, nor did they intend to pay the notes when they were executed, because they were executed with the fraudulent purpose of concealing the stock purchased by the bank;

That at the time of the negotiations for the purchase of said stock, and at the purchase thereof, the bank had purchased with its funds, in the manner set forth, about $80,000 of the $250,000 of the reduced capital stock of the bank;

That during said negotiations with the president and other officers of the bank by the defendant and Hood, and at the time of the purchase of said stock, the president and other officers of the bank represented to them that all of its capital stock had been subscribed for and issued to actual purchasers in good faith, and was then held and owned by such parties as stockholders of the bank, except an amount of the capital stock which the bank then had on hand which had been taken in by it to prevent a loss on indebtedness previously contracted in good faith, and had been so taken without violating the banking laws of the United States; that defendant believing those statements purchased of the bank two hundred shares of its capital stock of the par value of $20,000, which sum he paid therefor, and a certificate was issued to him by the bank; and,

That at the time of the purchase or attempted purchase by him of said stock for which the certificate was issued, the president and other officers of the bank, in order to have its books show correctly the amount of the outstanding stock, caused some or all of the parties who held certificates of stock in their names that had been purchased for and on account of the bank to surrender to the bank enough of such certificates for cancellation, so that the certificate issued to the defendant could be issued therefor and in the place thereof, and immediately upon the surrender of such certificates to the officers of the bank, and without the knowledge of the defendant,

the certificates were cancelled by the bank to an amount sufficient to enable it to issue the certificate so received by defendant; and that the parties who held said stock never at any time received the purchase money paid by the defendant for it, but the same was retained and kept by the bank Wherefore defendant demanded that the action be dismissed.

The defendant also filed a cross-petition and counterclaim, incorporating therein by reference all the allegations of his first and second defense. He alleged that by reason of the facts stated and the fraud and deceit practiced upon him by the bank and its officers, he has been damaged in the sum of $20,000, with interest from April 18th 1896. He further alleged that he had presented such claim to the receiver for allowance as a claim against the bank, and that the same had been rejected and refused by the receiver. He therefore prayed judgment against the bank for the above sum with interest, and asked that the same be paid ratably by the receiver out of the assets and funds of the bank in his control and possession.

We have given a full statement of the averments of the defendant's pleadings because in an attempt to condense them something might be omitted that was deemed by the plaintiff in error essential to his case, and because the questions presented for consideration may be regarded as important.

Assuming that the defendant became a shareholder in consequence of the fraudulent representations of the bank's officers, as set forth in the answer and cross-petition or counter-claim, two principal questions are presented for determination: 1. Whether such representations, relied upon by the defendant, constituted a defense in the present action brought by the receiver only for the purpose of enforcing the individual liability imposed by section 5151 of the Revised Statutes upon the shareholders of national banking associations. 2. Can the defendant, because of the frauds of the bank whereby he was induced to become a purchaser of its stock, have a judgment against the receiver on the counter-claim in this action for the money paid by him for stock, to be satisfied out of the bank's assets and funds in his control and possession?

The present action is beyond question one at law. Its object is to enforce a liability created by statute for the benefit of creditors who have demands against the bank of which the plaintiff is receiver. The defendant stood upon the books of the bank as a shareholder at the time it was placed in the hands of the receiver and he was accorded the privileges appertaining to that position. He claims exemption from the responsibility attaching to him, under the statute, as a shareholder upon the ground that in consequence of the frauds practised upon him he was entitled to disaffirm, and that he had upon due notice to the receiver disaffirmed, the

contract under which he purchased the stock in question. He seeks to have the certificate received by him treated as cancelled. Clearly such a defense is of an equitable nature, and could not be recognized and sustained except in some proceeding to which the bank, at least, was a party. If the defendant was entitled, under the facts stated, to a rescission of his contract of purchase, and to a cancellation of his stock certificate, and consequently to be relieved from all responsibility as a shareholder of the bank, he could obtain such a relief only by a suit in equity to which the bank and the receiver were parties.

The defendant alleges that he tendered to the receiver the certificate of stock received by him for cancellation, notifying and informing the latter that, because of the fraud and deceit practised upon him by which he was induced to purchase or attempt to purchase the stock represented by the certificate, he disaffirmed the contract of purchase or pretended purchase of the stock, and demanded that the receiver receive the certificate and cancel it and repay the sum of twenty thousand dollars paid by him, or such proportionate part thereof as he would be entitled to receive as a creditor of the bank for that amount, which tender and demand the receiver refused to accept or accede to. Such tender was an idle ceremony and added nothing to the rights of the defendant; for the receiver had no power to accept or cancel the certificate or to relieve the defendant from the responsibility attaching to him as one appearing upon the books of the bank as a shareholder and to whom had been accorded by the bank the privileges of a shareholder. His duty was to take charge of the assets of the bank and to enforce such assessment upon shareholders as was made by the Comptroller in virtue of the statute.

Nor could the bank, after its suspension and the appointment of a receiver, have assumed to discharge the defendant from any liability attaching to him as a shareholder. Upon the failure of the bank the rights of creditors attached and could not be affected by anything that the bank or its officers might, after such failure, have done or omitted to do. In *Earle* v. *Pennsylvania*, 178 *U. S.* 449, 455, we held that when a national bank suspends and is placed in the hands of a receiver the entire control and administration of its assets are committed to the receiver and the Comptroller, subject to whatever rights of priority, if any, may have been previously acquired by proceedings lawfully instituted against the bank before its suspension. So that the only way in which the defendant could have effectively raised the question of his liability as a shareholder, arising from frauds committed by the bank or its officers before its suspension whereby he was induced to become a shareholder, was by a suit in equity against the bank and the receiver. Instead of pursuing that course, he sought by interposing an equitable defense to defeat this action at law

brought by the receiver under the statute. That cannot be done, because under the Constitution of the United States the distinction between law and equity is recognized, so that in actions at law in a Circuit Court of the United States equitable defenses are not permitted. So, also "if the defendant," this court has said, "have equitable grounds for relief against the plaintiff, he must seek to enforce them by a separate suit in equity." *Northern Pacific R. R. Co.* v. *Paine*, 119 *U. S.* 561, 563. See also *Bennett* v. *Butterworth*, 11 *How.* 669; *Thompson* v. *Railroad Companies*, 6 *Wall.* 134; *Scott* v. *Neely*, 140 *U. S.* 106; *Scott* v. *Armstrong*, 146 *U. S.* 499, 512.

We must not be understood as expressing any opinion upon the question whether the defendant could have been discharged from liability as a shareholder if the facts stated in his answer by way of defense had been established in a separate suit in equity. Whether a decree based upon the facts set forth in the answer, even if established in a suit in equity brought, against the bank and the receiver after the appointment of a receiver would be consistent with sound principle or with the statute regulating the affairs of national banks and securing the rights of creditors, is a question upon which we do not now express an opinion. We mean at this time only to adjudge that the facts set forth in the answer present grounds of relief which cannot be made available by way of defense in this action at law, and if sufficient to protect the defendant against the liability attaching to him as a shareholder, must be alleged and proved in a suit in equity to which the bank and the receiver are made parties.

Some of the observations made in *Scott* v. *Deweese*, 181 *U. S.*——, are quite applicable to the present case. That was an action at law to enforce the individual liability imposed by section 5151 of the Revised Statutes. The defendant in that case sought to escape such liability upon the ground, in part, that he had been induced by false representations of the bank's officers to accept a certificate for a certain amount of its increased capital stock. No suit had been instituted to cancel the certificate or to rescind the subscription of stock. The court said: "The present suit is primarily in the interest of creditors of the bank. It is based upon a statute designed not only for their protection but to give confidence to all dealing with national banks in respect to their contracts, debts and engagements, as well as to stockholders generally. If the subscriber became a shareholder in consequence of frauds practised upon him by others, whether they be officers of the bank or officers of the Government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of section 5151, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position." Whether the defendant in that case could have been relieved from liability as a shareholder and had his sub-

scription of stock cancelled, if he had in good faith and in due time before the suspension of the bank instituted proceedings to obtain relief, was not decided.

The defendant, however, contends that the present suit is not embraced by the rule just announced because, he insists, the purchase by the bank of its stock—which he was induced thereafter by its fraud to purchase from it—was not simply voidable but was absolutely *void*; consequently, the sale to him of such stock was void and he did not by his purchase and by taking a certificate of stock become a shareholder within the meaning of section 5151.

It is true that the statute declares that no national bank shall be the purchaser or holder of any of its own shares of capital stock. *R. S.* § 5201. But will a violation of this provision by the bank relieve from liability one who holds a certificate of its stock and enjoys the right of a shareholder?

The statute forbids a national bank to lend money upon real estate as security. *R. S.* § 5137. Nevertheless, this court has frequently held that the borrower cannot escape liability for the repayment of the money so borrowed, nor dispute the right of the bank to enforce the security taken in violation of the statute; that it was for the Government and not for the borrower to complain of the bank's departure from the rule prescribed by statute. *Scott* v. *Deweese*, 181 *U. S.* ——, and authorities there cited.

In *National Bank* v. *Stewart*, 107 *U. S.* 676, 677, it appeared that a bank had loaned money on the security of its shares of stock held by the borrower. The debt not having been paid, the bank sold the stock and applied the proceeds to the payment of an equal amount of the debt. The stockholder then sued the bank to recover the value of the stock, relying on section 5201 of the Revised Statutes forbidding a national bank to make any loan or discount on the security of the shares of its own capital stock. The trial court held that as the statute forbade the bank to accept its own shares of stock as security for money loaned, the plaintiff was entitled to recover. The judgment was reversed by this court, which held that the statute imposed no penalty, either on the bank or borrower, if a loan was made in violation of its provisions; and that if the prohibition could be urged against the validity of the transaction by any one except the Government, it could only be done while the security was subsisting in the hands of the bank.

So in *Scott* v. *Deweese*, above cited, which involved a construction of section 5205 providing that no increase of a bank's capital stock shall be valid until the whole amount of such increase shall have been paid in, and until the Comptroller certifies that the amount of the increase has been duly paid in as part of the capital of the association. This court said: "The statute

does not, in terms, make *void* a subscription or certificate of stock based upon increased capital stock actually paid in, simply because the whole amount of any proposed or authorized increase has not in fact been paid into the bank. . . That the bank, after obtaining authority to increase its capital, issued certificates of stock without the knowledge or approval of the Comptroller and proceeded to do business upon the basis of such increase before the whole amount of the proposed increase of capital had been paid in, was a matter between it and the Government under whose laws it was organized, and did not render void subscriptions or certificates of stock based upon capital actually paid in, nor have the effect to relieve a shareholder, who had become such by paying into the bank the amount subscribed by him, from the individual liability imposed by section 5151."

In view of these decisions it cannot be held that the purchase by the bank of its own shares of stock was void. It was of course a matter of which the Government by its officers could take cognizance; and it may be that it was a matter of which stockholders, having an interest in the proper administration of the affairs of the bank, could complain in a proceeding instituted by them to restrain the bank from violating the statute. But, when the violation of the statute has occurred, it is not a matter of which a shareholder can complain in order that he may be relieved from the liability attaching to him as a shareholder and which the receiver seeks to enforce under the orders of the Comptroller. In the present case Judge Thayer, delivering the opinion of the Circuit Court of Appeals, well said: "In considering the second defense which was interposed by the defendant it is important to bear in mind that the two hundred shares of stock which he purchased from the bank was not void stock, but was stock which, according to the averments of the answer, had once been issued to other persons and had been reacquired by the bank by purchasing it from such other persons to prevent them from throwing it on the market at ruinous prices. It is necessary to infer from the averments of the answer that this stock had once passed the scrutiny of the Comptroller and had been outstanding and had been held by other persons since the organization of the bank in the year 1891. The purchase of this stock by the bank under the circumstances disclosed by the answer was doubtless *ultra vires*, but the purchase in question did not render the stock void. In purchasing it the bank made an unlawful use of its funds for which the officers concerned in the transaction could have been held responsible, as for any other unlawful act, if the corporation had sustained damage; but in point of fact, by the sale of the stock to the defendant that portion of its capital which had been dissipated by the purchase was restored by the resale and no loss seems to have been incurred. We are at a loss to understand how this transaction on the part

of the bank can operate to relieve the defendant from his liability as a stockholder in a suit brought by the receiver to recover a stock assessment which was levied solely for the benefit of corporate creditors. The sale of the stock to the defendant after the bank had purchased the same was not unlawful, since it operated to restore that part of the capital that had been retired and to that extent repaired the wrong which might otherwise have been done to the bank's creditors." 87 *Fed. Rep.* 865, 868.

It only remains to inquire whether, in any view of the case, the cross-petition or counter-claim can be sustained. We think not. The receiver sued in this case for the benefit of creditors who, it must be assumed upon this record, knew nothing of the circumstances under which the defendant became a shareholder. They trusted the bank and those who appeared on the list of shareholders required to be kept by section 5210 of the Revised Statutes, which list, that section declares, "shall be subject to the inspection of all the shareholders and creditors of the association." Referring to that section, this court, in *Pauly* v. *State Loan & Trust Co.*, 165 *U. S.* 606, 621, 622, said: "Manifestly, one, if not the principal, object of this requirement was to give creditors of the association, as well as State authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts and engagements." *Pullman* v. *Upton*, 96 *U. S.* 328, 330, 331; *National Bank* v. *Case*, 99 *U. S.* 628, 631. "It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out in the books of the association as the true owner, may be treated as the owner and therefore liable to assessments when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner; and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of stockholders required to be kept for the inspection of creditors and others would lose most of its value."

We perceive no ground whatever upon which the defendant can have a judgment upon his cross-petition or counter-claim against the receiver. That officer had nothing to do with the fraudulent transactions of the bank prior to its suspension. His duty was to take charge of its assets, and have them administered according to the rights of parties existing at the time of such suspension. Whether, if the defendant claimed a judgment against the bank or its officers for the alleged fraud or deceit of the latter officers, he could participate in the distribution of the proceeds of the stock

assessment until all the contract obligations of the bank had been met, was not decided by the Circuit Court of Appeals. That question was wisely reserved for decision when it should arise and become necessary to be decided. It was deemed by that court only necessary to adjudge that the receiver was entitled to a judgment against the defendant, and that the latter was not entitled in this action to a judgment against the receiver on account of frauds committed by the bank or its officers. In that view we concur.

Perceiving no error of law in the record, the judgment below is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

2586

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 270.

THE COMMERCIAL NATIONAL BANK, PLAINTIFF IN ERROR,

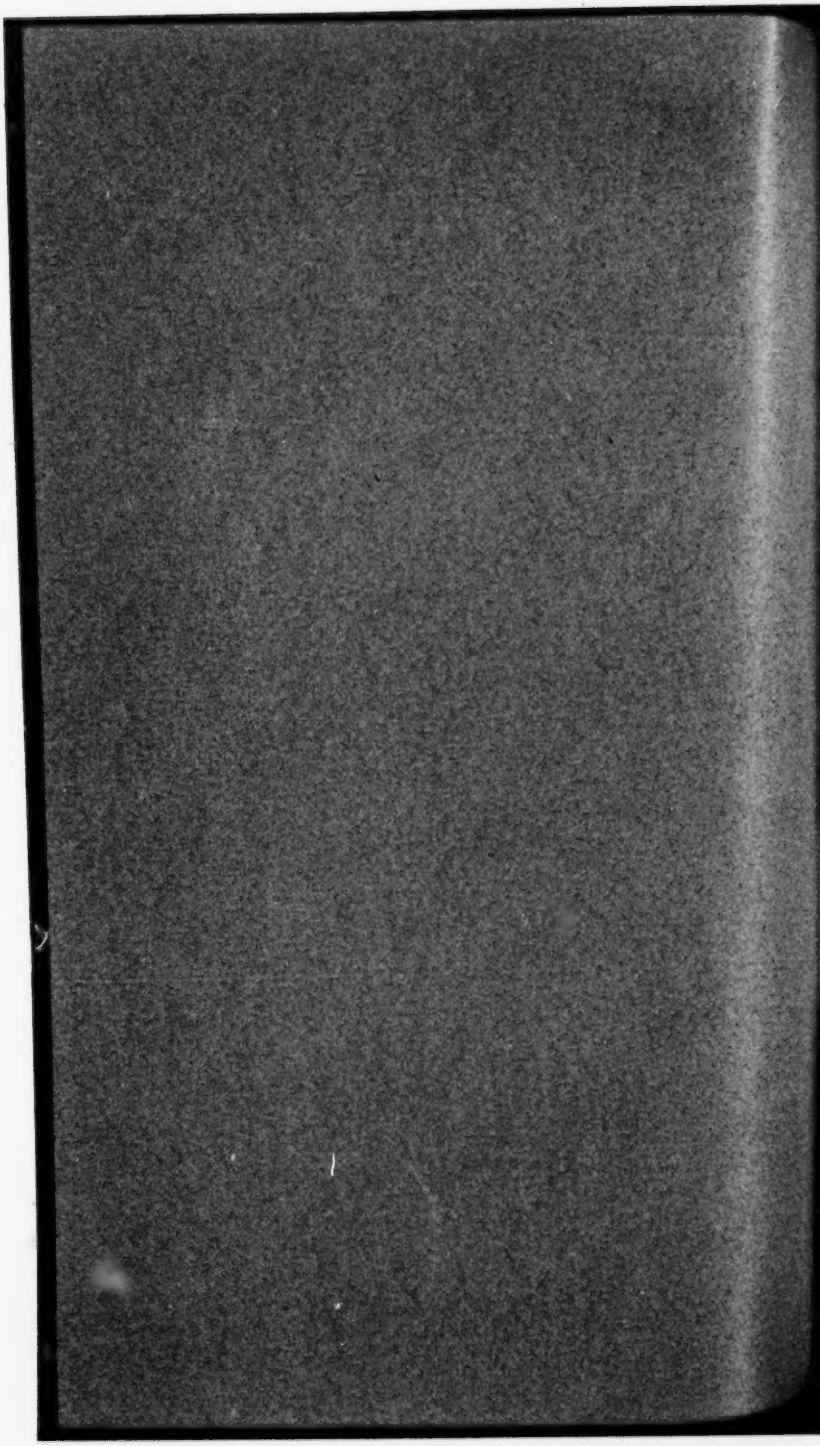
vs.

ALMA D. CHAMBERS, AS TREASURER OF WEBER COUNTY, UTAH

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED MAY 9, 1920.

(17,745)



(17,745.)

SUPREME COURT OF THE UNITED STATES.

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vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 1, 1900.

1 In the District Court of the Second Judicial District of the — Utah within and for the County of Utah.

COMMERCIAL NATIONAL BANK OF OGDEN, a Corporation, Plaintiff,
vs.
ALMA D. CHAMBERS, as Treasurer of Weber County, Utah, Defendant.

Complaint.

The plaintiff complains and alleges:

1. That it is now, and at all of the times herein mentioned was, a corporation duly organized and existing under and by virtue of the banking act of the United States, and as such national bank is now and has been during all of said times, conducting a general banking business at Ogden city, Weber county, Utah.

2. That the defendant is now, and at all of the times herein mentioned was, the duly elected, qualified and acting treasurer of said Weber county, Utah.

3. That on or about the 16th day of February, 1898, the cashier of plaintiff, in order to aid the assessor of said county in determin-g the value of its shares of stock, furnished a duly verified statement to said assessor, showing the amount and number of such shares of its capital stock, the amount of its surplus and all of its un-
2 divided profits, the amount of investments in real estate, and the names and places of residence of each and all of its stockholders, together with the number of shares held by each; that said statement was duly rendered and made, and was accepted by said assessor; that said cashier of plaintiff also, at said time, furnished to said assessor a statement, under his oath, setting forth specifically all the real estate owned by plaintiff on the first Monday in February, 1898, and that included therein was real estate owned by plaintiff and situated in the States of California and Idaho listed as of the approximate assessed valuation of nineteen thousand five hundred dollars; and that said assessor was satisfied with each and all of said statements.

4. That fifty thousand dollars of the capital stock of plaintiff is now, and at all of the times herein mentioned was, invested in and represented by bonds made and issued by the United States of America, and that plaintiff supplemented its said statement, so made and delivered to said assessor of Weber county, by furnishing said assessor and the board of equalization of said county, for said year, with an affidavit, duly made and sworn to by its said cashier, showing that the said fifty thousand dollars of the capital stock of plaintiff was and is so invested in and represented by said bonds of the United States as aforesaid.

5. That during the said month of February the plaintiff filed with said assessor an affidavit made by its shareholder, Edward Conant, in words and figures following, to wit:

STATE OF IDAHO, } ss:
County of Cassia, }

Edward Conant on oath says: I am a resident of Cassia county, Idaho, and a shareholder in the Commercial National Bank of Ogden. On the first Monday in February of the current
3 year, to wit: the — day of said month, there was due or owing from me the following *bona fide* debts, to wit:

To the Commercial National Bank of Ogden, Utah, in the aggregate	$2,900 00
By Conant Bros., a firm composed of myself and Henry Conant, $6,100, one-half	3,050 00
Aggregate	$5,950 00

I further on oath say that said aggregate indebtedness, and all thereof, was and is founded on an actual consideration, to wit, money loaned.

That none of the said indebtedness is barred by the statute of limitations.

EDWARD CONANT.

Subscribed and sworn to before me this 12th day of February, 1898.

JOHN F. HANSEN,
Clerk District Court.

6. That during said month plaintiff filed with said assessor an affidavit made by its shareholder H. O. Harkness of like tenor and effect, excepting that the amount due plaintiff from him was ten thousand dollars; and that at the same time plaintiff filed with the said assessor affidavits of like tenor and effect claiming deductions for local shareholders, all of which were by him allowed as to said last-named shareholders.

7. That said assessor of Weber county subsequently assessed the shares of stock of plaintiff to the respective shareholders on the basis of eighty dollars per share, as the value thereof; and plaintiff alleges that on the first Monday in February, 1898, and during the taxing year of 1898, the market value of said shares was not to exceed that amount.

8. That there has been deducted from said assessment the proportionate amount of the assessed value of the real estate of plaintiff in said Weber county (said assessed value being $27,535), but said assessor refused to deduct from said assessed value the proportionate amount of the assessed value of the real estate hereinbefore mentioned as situated outside the State of Utah, to wit, $19,500.00, and also refused to allow said stockholders, H. O. Harkness and Edward Conant, the deductions mentioned in their respective affidavits hereinbefore mentioned, or any part thereof.

4 9. That in refusing to make the aforesaid deductions the said assessor put his refusal upon the express grounds that the shareholders of plaintiff were not entitled to any deduction on

account of real estate owned by plaintiff outside of Utah, and that said shareholders, Harkness and Conant, being non-residents of Utah, were not entitled to any reduction on account of debts owing by them to plaintiff.

10. That on June 15, 1898, plaintiff filed with the board of equalization of said Weber county an affidavit in words and figures following, to wit:

The Commercial National Bank of Ogden.

JUNE 15, 1898.

To the Weber County board of equalization, Ogden, Utah:

Calling your attention to the verified statement of above bank to the assessor, as of February 7, 1898, and making said statement and the statements of the several stockholders under oath thereto appended a part of this application, and also calling your attention to attached notice of assessment, you will find that the assessor makes no deduction for the assessed value of the real estate mentioned situated outside of this State. You will also find that he makes no deductions from the value of the shares held by H. O. Harkness and Edward Conant of the amounts claimed in their respective statements under oath, heretofore mentioned.

This bank, and its officers, have made and delivered to the assessor of this county, prior to May 1, 1898, and subsequent to February 7, 1898, every statement required by law, and as required by law. In addition to this, the officers of said bank have at all times held themselves in readiness to obey all the provisions of section 2521 of the Revised Statutes of Utah, but the assessor, without any reference to said section, or the law, refused to allow any deduction for said items, or either of them, claiming that they did not
5 come within the provisions of sections 2508 and 2509 of the Revised Statutes of Utah.

Wherefore, you are requested to order said deductions.

T. D. RYAN,
Cashier Commercial National Bank of Ogden.

STATE OF UTAH, }
County of Weber, } ss:

T. D. Ryan, being sworn, on oath says: That he is cashier of the Commercial National Bank of Ogden, and makes this verification in its behalf. That he has read the foregoing statement and request, and knows the contents thereof, and that the same is true of his own knowledge.

T. D. RYAN.

Subscribed and sworn to before me this 15th day of June, A. D. 1898.

T. R. O'CONNOLLY,
Notary Public.

[SEAL.]

11. That the list of shareholders in the verified statement, as of February 7, 1898, of plaintiff to said assessor of Weber county, together with their places of residence and the number of shares held by each, was and is as follows, to wit:

Buchmiller, M.	Ogden, Utah	14⅔
Buchmiller, Maggie	Ogden, Utah	13
Buchmiller, Nellie	Ogden, Utah	13
Buchmiller, Le Roy	Ogden, Utah	13
Conant, Henry	Kelton, Utah	33⅓
Conant, Edward	Conant, Idaho	33⅓
Eccles, David	Ogden, Utah	27
Eccles Lumber Co.	Ogden, Utah	3
Fitzgerald, Thomas	Ogden, Utah	50
Guthrie, J. W.	Ogden, Utah	10
Harkness, H. O.	McCammon, Ida.	183⅓
Healy, Patrick	Ogden, Utah	40
Heywood, A. R.	Ogden, Utah	410
Heywood, L. G.	Ogden, Utah	10
Hay, George	Covina, Cal.	13⅓
Hume, R. T.	Ogden, Utah	33⅓
Jenkins, W. G.	Malad, Idaho	13⅓
King, N. M.	Sacramento, Cal.	13⅓
Loomis, J. H. & Son	Attica, N. Y.	13⅓
Malloy, Peter	Wadsworth, Nev.	13⅓
Peery, D. H.	Ogden, Utah	13⅓
Patterson, Adam	Ogden, Utah	20
Runyon, O. M.	Ogden, Utah	13

12. That the facts set out in said affidavit were and are true, and said board of equalization so recognized the same and was
6 satisfied therewith, but refused to take any action thereon on the same ground the said assessor refused to make said deductions.

13. That if deduction be made of the proportionate amount of said real estate and to said shareholders, Harkness and Conant, of the amounts claimed in their respective affidavits, the net assessable value per share and tax thereon would be as follows, to wit:

Valuation (assessed) upon plaintiff's capital stock	$80,000 00
Valuation of real estate in Weber county, Utah (tax $829.44 paid)	27,535 00
	$52,465 00
Valuation of real estate outside of Utah—paid on	19,500 00
Number of shares of capital stock 1,000	32,965 00
Net assessable value per share	32.965

Shareholder.	No. shares.	Net val.	Am't debts.	Tax.
Buchmiller, M.	14⅔	$483 50		$14 75
Buchmiller, Le Roy	13	428 55		13 07
Buchmiller, Maggie	13	428 55		13 07
Buchmiller, Nellie	13	428 55		13 07
Conant, Henry	33⅓	1,098 84	$14,050 00	
Conant, Edward	33⅓	1,098 84	5,950 00	
Eccles, David	27	980 06		27 15
Eccles Lumber Co.	3	98 89		3 02
Fitzgerald, Thomas	50	1,648 25		50 27
Guthrie, J. W.	10	329 65		10 05
Harkness, H. O.	183⅓	6,049 08	9,400 00	
Heywood, A. R.	410	13,515 65	1,200 00	375 63
Heywood, L. G.	10	329 65		10 05
Hay, George	13⅓	439 54		13 41
Hume, R. T.	33⅓	1,098 84	1,300 00	
Jenkins, W. G.	13⅓	439 54		13 41
King, N. M.	13⅓	439 54		13 41
Loomis, J. H. & Son	13⅓	439 54		13 41
Malloy, Peter	13⅓	439 54		13 41
Peery, D. H.	13⅓	439 54		13 41
Patterson, Adam	20	659 30	10,000 00	
Runyon, O. M.	13	428 55	350 00	2 40
Healy, Patrick	40	1,318 60	11,750 00	
	1,000			$612 99

7 14. That the tax on said real estate has been paid by plaintiff.

15. That on the 12th day of November, 1898, plaintiff duly tendered to defendant, as county treasurer of said Weber county, Utah, in lawful money of the United States, the total sum of $612.99 in payment of the total amount of the taxes due upon the total number of shares of plaintiff's capital stock from its shareholders, which said tender and offer of payment was then and there refused and rejected by said defendant; that thereupon and on the day aforesaid, plaintiff separately and severally duly tendered to defendant as treasurer as aforesaid, in lawful money of the United States, the sum set opposite the name of each of the stockholders of plaintiff in the column marked "tax" as shown by the statement or table hereinbefore set forth in paragraph thirteen hereof, in payment of the amount due from each of said stockholders for taxes upon the shares of stock of plaintiff owned by them, and that each and every of such tenders and offers of payment were then and there refused and rejected by said defendant.

16. That plaintiff is now, and at all times has been, ready and willing to pay to defendant, as treasurer as aforesaid, the said sum of $612.99 in satisfaction of the amount due from its shareholders, and for the payment of which it is liable, for taxes for the year 1898 upon its shares of capital stock; and plaintiff now makes it- said tender of said sum to said defendant good, and herewith pays the same into court for the use and benefit of defendant as such treasurer.

17. That the stockholders of plaintiff refuse to pay the amount of

tax upon their shares of stock demanded by defendant, and declare the same to be invalid and illegal; and that if plaintiff should pay the same it would be thereby rendered liable to a multiplicity of suits with its said stockholders, and to forfeit and lose so much of said tax so demanded by defendant as is unlawful and void.

8 18. That defendant, as such treasurer as aforesaid, is about to, and holds out and threatens that he intends to advertise as delinquent, as against plaintiff and its stockholders, the whole of said tax so claimed by him as aforesaid to be due from and payable by plaintiff, and to enforce payment of the whole thereof by plaintiff through legal proceedings, and by means of such procedure as the law provides for the enforced collection of taxes.

19. That plaintiff has no plain, adequate or complete remedy at law, and that unless the collection of said unlawful tax be restrained and enjoined plaintiff and its said shareholders will suffer and sustain great and irreparable damage and injury.

Wherefore plaintiff prays: That so *so* much of said tax levied and assessed against the shares of plaintiff's capital stock for the year 1898, in excess of the said sum of $612.99, be set aside and adjudged and decreed unlawful and void; and that defendant be required to accept said sum of $612.99, so tendered and now paid into court as aforesaid, in full satisfaction and payment of all taxes due from or payable by plaintiff and each and every of its stockholders for taxes upon the capital stock of plaintiff for the year 1898.

That said defendant be ordered and required to show cause before this court, at a time and place to be designated, why he should not be enjoined from advertising as delinquent the whole or any part of the tax levied or assessed upon or against the shares of the capital stock of plaintiff, or any part thereof, for the year 1898, and from taking any steps, action or proceedings, or using any endeavor whatsoever, to collect or effect payment of said tax for said year, or any part or portion thereof, either from plaintiff or its stockholders or any of them.

That in the meantime defendant, his agents, servants, attorneys and employees, and each of them, be restrained by order of this court, from doing, or suffering or permitting to be done, any

9 of said things; that upon the hearing of said order to show cause said defendant be enjoined from doing, or suffering or permitting to be done, any of the things above mentioned, and that upon the trial of this action said injunction be made permanent and perpetual.

For its costs of suit; and for such other and further relief as to the court may seem just and equitable in the premises.

HEYWOOD & TAIT,
Attorneys for Plaintiff.

STATE OF UTAH, }
County of Weber, } *ss:*

T. D. Ryan, being sworn, on oath says: That he is cashier of plaintiff, Commercial National Bank of Ogden, and makes this verification for and in its behalf; that he has read the foregoing com-

plaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated upon information and belief, and that as to those matters and things he believes it to be true.

T. D. RYAN.

Subscribed and sworn to before me this 1st day of December, 1898.

T. R. O'CONNOLLY,
Notary Public.

Filed December 1, 1898.

NEWTON FARR, *Clerk*,
By WILLARD HAMER, *Deputy.*

Demurrer.

(Title of Court and Cause.)

The defendant demurs to the complaint filed in this action, and for cause of demurrer alleges:

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. That said complaint is uncertain in this: That it does not show the rate of taxation levied against said property, and only alleges by way of argument and inference what the total amount of taxes would be if assessed as contended for by the plaintiff.

JOSEPH S. PERRY,
County Attorney and Attorney for Defendant.

Filed December 9, 1898.

NEWTON FARR, *Clerk*,
By L. R. CAHOON, *Deputy.*

10 *Minute Entry.*

(Title of Court and Cause.)

MARCH 6, 1899.

This cause came on regularly to be heard upon the demurrer of the defendant to the amended complaint of the plaintiff herein, and now comes the court and being sufficiently advised, it is hereby ordered that the order heretofore entered herein overruling the demurrer of the defendant to the original complaint of the plaintiff, be and the same is hereby set aside and said demurrer is hereby overruled, and that the defendant do have ten days in which to answer the complaint herein; and it is hereby further ordered that the restraining order heretofore issued herein be continued in full force until the final adjudication of this cause, and it is hereby further ordered by the court, upon its own motion, that the amendments proposed to the complaint, be and the same are hereby stricken out upon the grounds of irrelevancy.

ROLAPP, *J.*

Answer.

(Title of Court and Cause.)

Comes now the defendant and for his answer to the complaint on file herein denies each and every allegation therein contained not specifically admitfed in this answer.

The defendant admits paragraphs one and two of said complaint.

Admits that the cashier of the plaintiff furnished the assessor of Weber county a statement showing the amount and number of shares of its capital stock, the amount of its surplus and undivided profits, and the names and places of residence of each and all of its stockholders together with a number of shares held by each.

Admits paragraph five of said complaint.

Admits that H. O. Harkness made and filed with said assessor an affidavit of like tenor and effect claiming a deduction of $10,000.00.

Admits paragraph seven of said complaint.

Admits that said assessor deducted from the assessed value of said stock the assessed value of the real estate of plaintiff situate in Weber county.

11 Admits that said assessor refused to allow said Harkness and Conant the deduction in their respective affidavits, or any part thereof.

Admits tenth and eleventh paragraphs of said complaint.

Admits that the tax on the real estate situate in Weber county has been paid by the plaintiff.

Admits paragraph fifteen of said complaint.

Admits all of the sixteenth paragraph.

Wherefore, defendant prays that said action be dismissed and that he recover his costs herein.

GEORGE HALVERSON,
Attorney for Defendant.

STATE OF UTAH, }
County of Weber, } ss:

Alma D. Chambers, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has heard read the foregoing answer, and knows the contents thereof, and that the same *are* true of his own knowledge except as to matters and things therein stated upon information and belief, and as to those things he believes it to be true.

ALMA D. CHAMBERS.

Subscribed and sworn to before me this 13th day of March, 1899.

GEORGE HALVERSON,
Notary Public.

Filed March 13, 1899.

C. R. HOLLINGSWORTH, *Clerk,*
By L. J. HOLTHER, *Deputy.*

12 *Findings of Fact and Conclusions of Law.*

(Title of Court and Cause.)

This cause having been this day regularly called for trial before the court, sitting without a jury, Heywood & Tait appearing as counsel for the plaintiff, and George Halverson, county attorney, appearing as counsel for the defendant; and the court having heard the proofs of the plaintiff and defendant, submitting same without introducing any evidence, and the court having considered the same, and the records and papers in the case, and the arguments of the respective attorneys thereon now finds therefrom the following facts:

1. That the plaintiff is now, and at all of the times mentioned in the complaint was, a corporation duly organized and existing under and by virtue of the banking act of the United States, and as such national bank is now, and has been during all of said times, conducting a general banking business at Ogden city, Weber county, Utah.

2. That the defendant is now, and at all the times mentioned in the complaint in this action was, the duly elected, qualified and acting treasurer of said Weber county, Utah.

3. That on or about the 16th day of February, 1898, the cashier of plaintiff, in order to aid the assessor of said county in determining the value of its shares of stock, furnished a duly verified statement to said assessor, showing the amount and number of such shares of its capital stock, the amount of its surplus and all of its undivided profits, the amount of investments in real estate, and the names and places of residence of each and all of its stockholders, together with the number of shares held by each; that said statement was duly rendered and made, and was accepted by said assessor; that said cashier of plaintiff also, at said time, furnished to said assessor a statement, under his oath, setting forth specifically all the real estate owned by plaintiff on the first Monday of February, 1898, and that included therein was real estate owned by plaintiff and situated in the States of California and Idaho, listed as of the approximate assessed value of nineteen thousand five hundred dollars; and that said assessor was satisfied with each and all of said statements.

13 4. That fifty thousand dollars of the capital stock of plaintiff is now, and at all the times in said complaint mentioned was, invested in and represented by bonds made and issued by the United States of America, and that plaintiff supplemented its said statement, so made and delivered to said assessor of said Weber county, by furnishing said assessor, and the board of equalization of said county, for said year, with an affidavit, duly made and sworn to by its said cashier, showing that said fifty thousand dollars of the capital stock of plaintiff was and is so invested in and represented by said bonds of the United States as aforesaid.

5. That during the said month of February plaintiff filed with

the said assessor an affidavit made by its shareholder Edward Conant, in words and figures following, to wit:

STATE OF IDAHO, } ss:
County of Cassia, }

Edward Conant on oath says: I am a resident of Cassia county, Idaho, and a shareholder in the Commercial National Bank of Ogden. On the first Monday in February of the current year, to wit, the 7th day of said month, there was due or owing from me the following *bona fide* debts, to wit:

To the Commercial National Bank of Ogden, Utah, in the aggregate	$2,900 00
By Conant Bros., a firm composed of myself and Henry Conant, $6,100, one-half	3,050 00
Aggregate	$5,950 00

I further on oath say that said aggregate indebtedness, and all thereof, was and is founded on an actual consideration, to wit: money loaned.

That none of the said indebtedness is barred by the statute of limitations.

EDWARD CONANT.

Subscribed and sworn to before me this 12th day of February, 1898.

JOHN F. HANSON,
Clerk District Court.

14 6. That during said month plaintiff filed with said assessor an affidavit made by its shareholder H. O. Harkness of like tenor and effect excepting that the amount due plaintiff from him was ten thousand dollars; and at the same time plaintiff filed with said assessor affidavits of like tenor and effect, claiming deductions for local shareholders, all of which were by him allowed as to said last-named shareholders.

7. That said assessor of Weber county subsequently assessed the shares of stock of plaintiff to the respective shareholders on the basis of eighty dollars per share, as the value thereof; that on the first Monday in February, 1898, and during the taxing year of 1898, the market value of said shares was not to exceed that amount.

8. That there was deducted from said assessment the proportionate amount of the assessed value of the real estate of plaintiff in said Weber county (said assessed value being $27,535.00), but said assessor refused to deduct from said assessed value the proportionate amount of the assessed value of the real estate hereinbefore mentioned as situated outside of the State of Utah, to wit, $19,500, and also refused to allow said stockholders, H. O. Harkness and Edward Conant, the deductions mentioned in their respective affidavits hereinbefore mentioned, or any part thereof.

9. That in refusing to make the aforesaid deductions the said assessor put his refusal upon the express grounds that the shareholders of plaintiff were not entitled to any deduction on account of real estate owned by plaintiff outside of Utah, and that he was advised by counsel that said shareholders, Harkness and Conant, being non-residents of Utah, were not entitled to any deduction on account of debts owing by them to plaintiff.

10. That on June 15, 1898, plaintiff filed with the board of equalization of said Weber county an affidavit in words and figures following, to wit:

15 The Commercial National Bank of Ogden.

JUNE 15, 1898.

To the Weber county board of equalization, Ogden, Utah:

Calling your attention to the verified statement of above bank to the assessor, as of February 7, 1898, and making said statement and the statements of the several stockholders under oath thereto appended, a part of this application, and also calling your attention to attached notice of assessment, you will find that the assessor makes no deduction for the assessed value of the real estate mentioned situated outside of this State. You will also find that he makes no deductions from the value of the shares held by H. O. Harkness and Edward Conant of the amounts claimed in their respective statements under oath, heretofore mentioned.

This bank, and its officers, have made and delivered to the assessor of this county, prior to May 1, 1898, and subsequent to February 7, 1898, every statement required by law, and as required by law. In addition to this the officers of said bank have at all times held themselves in readiness to obey all the provisions of section 2521 of the Revised Statutes of Utah, but the assessor, without any reference to said section, or the law, refused to allow any deduction for said items, or either of them, claiming that they did not come within the provisions of sections 2508 and 2509 of the Revised Statutes of Utah.

Wherefore, you are requested to order said deductions.

T. D. RYAN,
Cashier Commercial National Bank of Ogden.

STATE OF UTAH,)
County of Weber,) ss:

T. D. Ryan, being sworn, on oath says: That he is cashier of the Commercial National Bank of Ogden, and makes this verifica-
16 tion in its behalf; that he has read the foregoing statement and request, and knows the contents thereof, and that the same is true of his own knowledge.

T. D. RYAN.

Subscribed and sworn to before me this 15th day of June, 1898.

T. R. O'CONNOLLY,
Notary Public.

[SEAL.]

11. That the facts set out in said affidavit were true. Said board of equalization, however, refused to take any action thereon on the same ground the said assessor refused to make said deductions.

12. That if deduction be made of the proportionate amount of said real estate and to said shareholders, Harkness and Conant, of the amounts claimed in their respective affidavits, the net assessable value per share and tax thereon would be as follows, to wit:

Valuation (assessed) upon plaintiff's capital stock.....	$80,000 00
Valuation of real estate in Weber county, Utah (tax $829.44 paid).....	27,535 00
	$52,465 00
Valuation of real estate outside of Utah, paid on.....	19,500 00
Number of shares of capital stock 1,000.....	32,965 00
Net assessable value per share.....	32 965

17 Shareholder.	No. shares.	Net val.	Am't debts.	Tax.
Buchmiller, M	14⅔	$483 50		$14 75
Buchmiller, Le Roy	13	428 55		13 07
Buchmiller, Maggie	13	428 55		13 07
Buchmiller, Nellie	13	428 55		13 07
Conant, Henry	33⅓	1,098 84	$14,050 00	
Conant, Edward	33⅓	1,098 84	5,950 00	
Eccles, David	27	980 06		27 15
Eccles Lumber Co	3	98 89		3 02
Fitzgerald, Thomas	50	1,648 25		50 27
Guthrie, J. W	10	329 65		10 05
Harkness, H. O	183⅓	6,049 08	9,400 00	
Heywood, A. R	410	13,513 65	1,200 00	375 63
Heywood, L. G	10	329 65		10 05
Hay, George	13⅓	439 54		13 41
Hume, R. T	33⅓	1,098 84	1,300 00	
Jenkins, W. G	13⅓	439 54		13 41
King, N. M	13⅓	439 54		13 41
Loomis, J. H. & Son	13⅓	439 54		13 41
Malloy, Peter	13⅓	439 54		13 41
Peery, D. H	13⅓	439 54		13 41
Patterson, Adam	20	659 30	10,000 00	
Runyon, O. M	13	428 55	350 00	2 40
Healy, Patrick	40	1,318 60	11,750 00	
	1,000			$612 99

12 A. That the stockholders of plaintiff refuse to pay the amount of tax upon their shares of stock demanded by defendant, and declare the same to be invalid and illegal.

13. That neither of said non-resident stockholders of plaintiff, Edward Conant and H. O. Harkness, did have at any of the times mentioned in said complaint or herein, or now have, any other credits secured, or unsecured, due or owing to them, or due or owing to any firm, copartnership or corporation of which they or either of them

are or were members, which they are, or either of them is or were, required to list in the State of Utah under the provisions of sections 2517 or 2518 of the Revised Statutes of Utah, or at all; and that neither of said non-resident stockholders, or any firm, copartnership or corporation of which they or either of them are or were members, have claimed or received the benefit of any deduction in taxation on account of the debts mentioned and set forth in their respective affidavits, hereinbefore mentioned, in any other county in the State of Utah, or in any other State, or at all.

18 14. That the tax on said real estate for the taxing year of 1898 has been paid by plaintiff.

15. That on the 12th day of November, 1898, plaintiff duly tendered to defendant, as county treasurer of said Weber county, Utah, in lawful money of the United States, the total sum of $612.99 in payment of the total amount of taxes due upon the total number of shares of plaintiff's capital stock from its shareholders, which said tender and offer of payment was then and there refused and rejected by said defendant; that thereupon and on the day aforesaid, plaintiff separately and severally duly tendered to defendant as treasurer as aforesaid, in lawful money of the United States, the sum set opposite the name of each of the stockholders of plaintiff in the column marked "Tax" as shown by the statement or table hereinbefore set forth in finding twelve, in payment of the amount due from each of said stockholders for taxes upon the shares of stock of plaintiff owned by them, and that each and every of such tenders and offers of payment were then and there refused and rejected by said defendant.

16. That plaintiff has at all times been ready and willing to pay to defendant, as treasurer as aforesaid, the said sum of $612.99 in satisfaction of the amount due from its shareholders, and for the payment of which it is liable, for taxes for the year 1898 upon its shares of capital stock; and made its said tender of said sum good, by paying the same into court for the use and benefit of defendant as such treasurer.

17. That the total tax levy, in said Weber county, Utah, for the year 1898, was thirty and one-half mills for each one dollar in valuation.

18. That the tax against the several shareholders of plaintiff as entered on the tax-roll of said Weber county, and as claimed by defendant for said year 1898, is as follows:

19 Name.	Residence.	No. shares.	Tax.
Buchmiller, M.	Ogden, Utah	14⅔	$25 29
Buchmiller, Le Roy	Ogden, Utah	13	22 41
Buchmiller, Maggie	Ogden, Utah	13	22 41
Buchmiller, Nellie	Ogden, Utah	13	22 43
Conant, Henry	Kelton, Utah	33⅓	
Conant, Edward	Conant, Idaho	33⅓	57 46
Eccles, David	Ogden, Utah	27	46 52
Eccles Lumber Co.	Ogden, Utah	3	5 14
Fitzgerald, Thomas	Ogden, Utah	50	86 18
Guthrie, J. W.	Ogden, Utah	10	17 20

Harkness, H. O.	McCammon, Id.	183⅓	316 08
Healy, Patrick	Ogden, Utah	40	
Heywood, A. R.	Ogden, Utah	410	668 34
Heywood, L. G.	Ogden, Utah	10	17 25
Hay, George	Covina, Cal.	13⅓	22 99
Hume, R. T.	Ogden, Utah	33⅓	15 85
Jenkins, W. G.	Malad, Idaho	13⅓	22 98
King, N. M.	Sacramento, Cal.	13⅓	23 00
Loomis, J. H. & Son	Attica, N. Y.	13⅓	22 99
Malloy, Peter	Wadsworth, Nev.	13⅓	23 01
Peery, D. H.	Ogden, Utah	13⅓	22 99
Patterson, Adam	Ogden, Utah	20	
Runyon, O. M.	Ogden, Utah	13	11 21
		1,000	1,471 73

19. That the State board of equalization of the State of Utah raised the valuation on personal property in said Weber county (except money) five per cent. for said year 1898.

As a conclusion of law, from the foregoing findings of fact, the court finds that plaintiff is entitled to a judgment and decree as prayed in its said complaint.

Dated this 5th day of May, 1899.

HENRY H. ROLAPP, *Judge.*

Filed May 5, 1899.

C. R. HOLLINGSWORTH, *Clerk.*

Decree.

(Title of Court and Cause.)

This cause having been regularly called and tried by the court, and the findings of fact and conclusions of law, and the decision thereon in writing having been duly rendered by the court, which are now on file in this cause, wherein judgment was awarded in favor of the plaintiff, Commercial National Bank of Ogden, and against the defendant, Alma D. Chambers, as treasurer of Weber county, Utah, on motion of Heywood & Tait, counsel for plaintiff:

It is now, therefore, hereby

20 Ordered, adjudged and decreed, that so much of the total amount of all taxes levied and assessed against the shares of the capital stock of said Commercial National Bank of Ogden, plaintiff as aforesaid, by the assessor of Weber county, Utah, for the year 1898, in excess of the sum of six hundred twelve dollars and ninety-nine cents ($612.99) be, and the same is hereby, vacated and set aside, and adjudged and decreed invalid, unlawful and wholly void and of no effect.

That defendant, Alma D. Chambers, as treasurer of Weber county, Utah, be, and he is hereby, directed, ordered and required to accept from plaintiff the said sum of $612.99, now on deposit in this court, for his use and benefit as treasurer as aforesaid, in full satisfaction, pay-

ment and discharge of all taxes levied or assessed against the shares of the capital stock of plaintiff for said year 1898, and to give plaintiff an acquittance and receipt in full therefor.

That the restraining order and temporary injunction heretofore granted and issued herein against defendant be, and the same is hereby, made perpetual; and said defendant is, and each and every of his agents, deputies, servants and attorneys are hereby perpetually enjoined and restrained from advertising as delinquent, and from in any manner whatsoever collecting, or attempting to collect any part of the tax levied or assessed upon the shares of capital stock of plaintiff, or any of them, for said year 1898 by said Weber county, Utah, in excess of said sum of $612.99, so tendered and paid into court by plaintiff as aforesaid.

That plaintiff have and recover of and from defendant its costs herein, taxed at $—, and that execution issue therefor.

Dated this 5th day of May, 1899.

HENRY H. ROLAPP, *Judge.*

Filed May 5, 1899.

C. R. HOLLINGSWORTH, *Clerk.*

Recorded decree, Book 3, page 496.

21 *Certificate.*

(Title of Court and Cause.)

STATE OF UTAH, } ss:
County of Weber, }

I, the undersigned, clerk of the district court of the county of Weber, State of Utah, do hereby certify that the foregoing is a true copy of the judgment rendered in the above-entitled action, and recorded in Judgment Book 3, of said court, at page 496.

And I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and the seal of said court hereto set on this 5th day of May, A. D. 1899.

[SEAL.] C. R. HOLLINGSWORTH, *Clerk.*

Filed May 5, 1899.

C. R. HOLLINGSWORTH, *Clerk.*

Minutes of Board of County Commissioners of Weber County.

SATURDAY, *June* 3, 1899.

In a communication addressed to the board, County Attorney Halverson advised that he be directed to appeal the case of Commercial National Bank *vs.* Alma D. Chambers, treasurer, etc., which was decided in favor of the plaintiff by Judge Rolap in the second district court. After due consideration, on motion of Commissioner Smith, it was unanimously ordered that the county attorney be, and he is hereby instructed to appeal said case to the supreme court of

the State of Utah from the decision rendered by the second district court.

L. B. ADAMS,
Chairman of Board.

22 *Notice of Appeal.*

(Title of Court and Cause.)

To the plaintiff above named and Heywood & Tait, its attorneys, and to the clerk of said court:

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the State of Utah from the judgment and decree made and entered in said district court on the 5th day of May, 1899, in favor of the plaintiff and against the defendant above named, and from the whole thereof.

GEORGE HALVERSON,
Attorney for Defendant.

Service of a copy is hereby acknowledged this 22nd day of September, 1899.

HEYWOOD & TAIT,
Attorneys for Plaintiff.

Certificate.

STATE OF UTAH, } ss:
County of Weber, }

I, the undersigned, clerk of the district court of the second judicial district of the State of Utah, in and for the county of Weber, do hereby certify that the above and foregoing are the original "complaint," filed December 1, 1898; "demurrer," filed December 9, 1898; "minute entry," dated March 6, 1899; "answer," filed March 13, 1899; "findings of fact and conclusions of law," filed May 5, 1899; "certificate to judgment-roll," filed May 5, 1899; "minute entry," made and entered June 3, 1899; "notice of appeal," filed September 22, 1899, and "petition in error," filed October 4, 1899, in the above-entitled cause now pending in this court, and that said papers are hereby transmitted to the supreme court of — State of Utah, pursuant to an appeal duly perfected in said cause by Alma D. Chambers, as treasurer of Weber county, Utah.

And I further certify that there is now on file in my office in the above-entitled cause a stipulation of the parties hereto duly waiving an undertaking on appeal herein, which said stipulation has been properly filed in said court.

In witness whereof I have hereto set my hand and affixed the seal of said court, this 4th day of October, A. D., 1899.

C. R. HOLLINGSWORTH, *Clerk,*
[SEAL.] By L. J. HOLTHER, *Deputy.*

23 *Petition in Error.*

(Title of Court and Cause.)

Comes now Alma D. Chambers as treasurer of Weber county, State of Utah, the appellant herein, and says that at the May term, 1899, of the district court of the second judicial district in and for the county of Weber, State of Utah, the respondent herein recovered a judgment, by the consideration of said court on the 5th day of May, 1899, against the appellant, in an action therein pending wherein the respondent was plaintiff and the appellant herein was defendant, a transcript of the record and journal entries in said cause are herewith filed.

And appellant further says that said record and proceedings contain the following errors prejudicial to appellant upon which the appellant relies for a reversal of said action and judgment, to wit:

1. The court errerred in overruling appellant's demurrer to the complaint on the grounds that the complaint does not state facts sufficient to constitute a cause of action.

2. The court erred in overruling appellant's demurrer to the complaint on the ground that said complaint is uncertain in this: That said complaint does not show the rate of taxation levied against said property, and only alleges by way of argument and inference what the total amount of taxes would be if assessed as contended for by the plaintiff.

3. The court erred in making its 13th finding of fact for the reason that said finding of fact is not embraced within the issues made by the pleading in said cause.

4. The court erred in making the 17th finding of fact for the reason that said finding of fact is not embraced within the issues made by the pleading in said cause.

5. The court erred in making the 18th finding of fact for the reason that said finding of fact is not embraced within the issues made by the pleadings in said cause.

6. The court erred in making the 19th finding of fact for the reason that said finding of fact is not embraced within the issues made by the pleadings in said cause.

24 7. The court erred in making the conclusion of law herein for the reason that said conclusion of law is not justified by the findings of fact made and entered in said cause.

8. The court erred in ordering judgment and decree herein in favor of respondent and against appellant for the reason that said judgment and decree is not sustained by the findings of fact made and entered in said cause.

9. The court erred in holding by said conclusion of law and the judgment and decree that the real estate owned by plaintiff outside the State of Utah should be deducted from the market value of the shares of stock belonging to the shareholders in said bank in arriving at the value of said bank stock for the purpose of taxation.

10. The court erred in holding by said conclusion of law and the

judgment and decree herein that Edward Conant and H. O. Harkness, shareholders in said bank, were entitled to deduct the debts alleged, or any of their debts, from the value of their bank stock in listing their property for taxation.

11. The court erred in holding by said conclusion of law and the judgment and decree in said cause that Edward Conant and H. O. Harkness were entitled to the deductions claimed upon making the showing to said assessor by the affidavits set out and referred to in the complaint and in not holding that the showing made was insufficient to entitle said parties to said deductions.

12. The court erred in holding by said conclusion of law and the judgment and decree entered in said cause that said shareholders in said national bank, in listing said bank shares for taxation, were entitled to deduct their debts from the value of their bank stock.

13. The court erred by said conclusion of law and the judgment and decree entered in said cause that all the taxes levied and assessed against the shares of stock in said bank in excess of $612.99 was unlawful and void, and in vacating and setting the same aside.

25 14. The court erred in not ordering judgment in favor of appellant and against the respondent.

Wherefore, appellant prays that said judgment and decree be reversed and that he be restored to all things lost under said judgment and decree.

GEORGE HALVERSON,
Attorney for Appellant.

26 In the Supreme Court of the State of Utah, Regular February Term.

FEBRUARY 21, 1900.

COMMERCIAL NATIONAL BANK, Respondent,
v.
ALMA D. CHAMBERS, Treasurer of Weber County, Appellant. } Submission.

This cause, having been heretofore argued by Mr. George Halverson in behalf of the appellant, by Hon. A. R. Heywood in reply, was submitted and by the court taken under advisement.

Title of Court and Cause.

APRIL 10, 1900.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the court below be, and the same is hereby, reversed, with costs, and remanded with instructions to said court to set aside its decree and enter judgment in accordance with this opinion.

27 In the Supreme Court of the State of Utah.

COMMERCIAL NATIONAL BANK, Respondent,
v.
ALMA D. CHAMBERS, Treasurer of Weber County, Appellant.

BARTCH, *C. J.*:

This suit was brought by the plaintiff against the treasurer of Weber county to have declared void all taxes assessed against the bank for the year 1898 in excess of $612.99, and to have the treasurer enjoined from collecting such excess and from enforcing the collection by sale of the property assessed or otherwise. The findings of fact show that the plaintiff bank is a corporation organized and existing by virtue of the banking act of the United States, and has been and now is conducting a general banking business as a national bank in Ogden city, Weber county, Utah. For the purposes of taxation the bank's capital stock in 1898 was valued at $80,000, its real estate situate in Utah was valued at $27,535, and its real estate situate outside of this State at $19,500. In levying the tax the value of the
28 real estate situate within the State was deducted from the value of the stock, but a deduction of the *of the* value of the real estate situate without the State was refused. Likewise, the *bona fide* debts of resident shareholders were deducted from the value of the stock, and deduction refused of such debts of non-resident shareholders. The total amount of tax levied against the stock and claimed by the defendant for that year is $1,471.73. The amount offered to be paid by the plaintiff is $612.99. At the trial the court entered a decree in favor of the plaintiff, and this appeal is from that decree.

The material question is, was the respondent entitled to deductions from the stock assessment for the value of the real estate situate without the limits of this State, and to have the *bona fide* debts of non-resident shareholders deducted from the value of their stock?

The appellant insists that the court erred in allowing such deductions. Whether or not this insistence is sound must be determined by reference to the constitutional and statutory provisions relating to the subject.

In sec. 2, art. 13, const., it is provided: "All property in the State, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word property, as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises and all other matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stocks, has been taxed."

Under this provision all property in this State must be
29 "taxed in proportion to its value" except such as is exempt under the provisions of the constitution or by virtue of the Constitution of the United States. It will be observed that "credits"

and "stocks" are included within the meaning of the word "property," as used in reference to the subjects of taxation, and these two classes are separately and distinctly mentioned as being included. All kinds of credits and stocks are therefore susceptible of being taxed, except as may be otherwise provided by the fundamental law. In the same section, as will be noticed, it is provided that stocks of any company or corporation are not taxable "when the property of such company or corporation represented by such stocks has been taxed." The word "stocks" is in the plural form and, as here used, evidently means property consisting of shares in joint stock companies, whether of banking institutions or other corporations. It is referred to as a distinct species of property. The word "credits" is also in the plural form and, as here used, evidently means all debts due and owing, from whatever source, to the party whose property is to be taxed. The word, as employed in this provision, clearly refers to a species of property entirely distinct and different from that of stocks. Thus, under sec. 2 of the constitution all "credits" would be subject to taxation were it not for the limitation contained in section 3 of the same enactment, which reads: "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his or her or its property: Provided, that a deduction of debts from credits may be authorized."

Here is a provision that "debts" may be deducted from "credits" in the taxation of property. To the extent, therefore, that the debts owing by any person whose property is being taxed offset the credits or debts owing to him the credits cannot be taxed, and to that extent this provision is a limitation upon section 2. Stocks, however, are not included in the limitation, they not being included within the proviso, and here we apprehend the maxim, *expressio unius est exclusio alterius*, applies. The framers of the constitution having thus referred to "credits" and "stocks" as separate species of property for the purposes of taxation and having provided different limitations as to each, they must for such purposes be treated separately and distinctly. It may further be observed that, according to the terms of section 3, every species of property in the State, except, of course, such as is exempt, must be taxed, "according to its value in money," by a uniform and equal rate of assessment and a "just valuation" which must be provided for by the legislature, and the injunction for this is "so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property."

In Judge *v.* Spencer, 15 Utah, 242, where the question was whether mortgages were taxable, this court, after considering section 2 and referring to section 3, said:

"This provision made it incumbent upon the legislature to provide a uniform system by which every species of property within the State not exempt by the organic law should equally and ratably bear its due proportion of the public burden, and the legislature had no

power to exempt property not exempt under the constitution. The intention manifest from the several provisions of that instrument respecting revenue and taxation is not only that previous
31 territorial legislation as to such exemptions should be repealed, but also that no power should exist in the State government to grant exemptions other than those mentioned in the constitution."

It will also be seen upon examination that in neither of the constitutional provisions is there any direct reference, with respect to taxation, to corporate property situate without the limits of the State, nor is there any provision for the deduction of debts from stocks, and as, in the organic law, "credits" and "stocks" of corporations are treated as separate species of property and the legislature is commanded to provide by law uniform and equal rates of assessment and for just valuation of every kind of taxable property within the State, it becomes important to ascertain what the statute law respecting the matters under consideration is.

Sec. 2506, R. S., requires all property to be "assessed at its full value," agreeably to section 2 of the constitution.

Sec. 2507, *id.*, reads: "The stockholders in every bank or banking association organized under the authority of this State or of the United States, must be assessed and taxed on the value of their shares of stock therein, in the county, town, city, or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. To aid the assessor in determining the value of such shares of stock, the cashier or other accounting officer of every such bank must furnish a verified statement to the assessor showing the amount and number of shares of the capital stock of each bank, the amount of its surplus or reserve fund or undivided profits, the amount of investments in real estate, which real estate must be assessed to said bank and taxed as other real estate, and the names and places of residence of its stockholders, together with the number of shares held by each."

32 In this case there is no contention that the tax was not assessed, nor that no statement was furnished the assessor as provided.

Sec. 2508, *id.*, reads:

"In the assessment of the shares of stock mentioned in the next preceding section, each stockholder must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this State, and the assessment and taxation must not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State."

Under this provision every stockholder of a bank, whether a resident or non-resident of this State, is entitled to and must be allowed all the deductions and exemptions in the assessment of his shares as are allowed in the taxation of other taxable personal property owned by a resident citizen, and the rate must not be greater than is assessed upon other moneyed capital in the hands of such a citizen. There is, however, nothing in this provision authorizing the deduction of debts from the value of stocks in the hands either of a resident or

non-resident individual. The only deductions authorized are debts from credits. "The term 'credit-' means those solvent debts, secured or unsecured, owing to a person." Sec. 2505, subd. 6, R. S. "The term 'debts' means those secured or unsecured liabilities owing by a person." Subd. 7, *id.* Nor can the words "moneyed capital," employed in section 2508, have the effect to enlarge the meaning of the term "credits," as used in the constitution and statute, so as to include bank stocks, and then permit the deduction of debts from the value of shares in national banks; nor can those words have such an effect as to any other corporation. As we have seen, stocks
33 are not credits within the meaning of the constitution. Stock is not an indebtedness due the owner, but simply an interest in the assets or property of the corporation.

Niles *v.* Shaw, 50 Ohio St., 370.

Bridgman *v.* City of Keokuk, 72 Ia., 42.

Sec. 2509, *id.*, provides:

"In making such assessment, there must also be deducted from the value of such shares, such sum as is in the same proportion to such value as the assessed value of the real estate of such bank or banking association in which such shares are held, bears to the whole amount of the capital stock, surplus, reserve, and undivided profits of such bank or banking association."

Here is a provision which permits a deduction from the value of the shares in banking institutions of the value of the real estate, where such real estate held by the bank and represented by such shares has been taxed. Real estate so held is assessed to the bank and taxed the same as real property held by an individual is taxed to him, and therefore its value is deducted from the value of the shares so as to avoid double assessment.

This is in harmony with section 2 of the constitution above considered.

The remaining section of the Revised Statutes material in this case is 2518, which, among other things, provides that "in making up the amount of credits which any person is required to list he will be entitled to deduct from the gross amount of such credits the amount of all *bona fide* debts owing by him." This accords with section 3 of the constitution, which authorizes a deduction of debts from credits.

Thus, from an examination of the several constitutional and statutory provisions respecting the subject of taxation, it is
34 evident that the only deductions which are authorized in the assessment of the shares of stock of any national bank or other corporation organized and doing business in this State are deductions from the value of the shares of the value of the real estate, which is represented by the stock, and which has been assessed, and deductions of *bona fide* debts from credits. It is also clear that moneyed capital invested in national banks is placed precisely upon the same basis as moneyed capital invested in other banks, and that there is no unfriendly discrimination in favor of State corporations.

In the case at bar deductions were made from the value of the

stock of the value of all real estate owned by the bank which is situate within the limits of the State, but deductions for its real estate situate without the State were refused by the assessor and board of equalization, but the court below ordered that the value of the real estate situate in other States should also be deducted from the value of the stock. In this we think the court erred.

It is true the bank is a corporation organized under the banking act of the United States, but it is located in this State and is conducting its business here. All of its property, therefore, not exempt, situate or held, owned, and used within this jurisdiction is within the taxing power of this State. The power of taxation extends to every species of property which exists within the limits of the State by its authority, or which is introduced by permission of the State, unless such power be excluded expressly or by necessary implication. A national bank, although a United States institution and subject to its control, is taxable in the State where located by consent of Congress, as will hereinafter be seen.

35 The property of the respondent bank being thus within the taxing power of the State, it must be taxed, as provided by our laws, the same as other property, and, as we have seen, our constitution and statutes provide that all taxable property shall be taxed according to its value in money, which has been construed to be at its full cash value, and banking corporations are to be taxed on the value of the stock at the place where the corporation is located and not elsewhere. Now, if the value of its real estate situate in other States, where this State has no jurisdiction, is to be deducted from the value of the stock, how can the stock of the bank be taxed at its cash value? Yet stock is property within the meaning of the constitution and statute. When its real property situate within the State is taxed, then its value should be deducted from the value of the stock which represents such real property, for otherwise there would be a double assessment, in that the same property would be taxed as other real estate and also as represented by the stock. In such case all the property is still taxed at its full cash value, but this is not so as to real estate situtate in another State which cannot be taxed here. Under the power of taxation property must be treated as it exists here, without reference to that of another State, where we have no jurisdiction whatever. Stock of a bank or corporation located in this State, being property within the meaning of our revenue laws, must be treated as such.

Suppose, for instance, three-fourths of the property in value of the bank were situate in another State and its stock here was worth one hundred cents on the dollar, and for the purpose of taxation the value of such property were deducted from the value of the stock, could it be said that the stock was assessed at its cash value?

36 The shares of stock of such a corporation are subject to State control in respect to the right of taxation, and therefore every person who takes them must take them subject to such control, and it matters not whether he be a resident or non-resident. The State has a right to fix a particular situs as to such stock for the purposes of taxation, and its value for such purposes cannot be di-

minished by deducting therefrom the value of property not situated or taxable within the State and over which the State can exercise no control. The bank therefore had no right to have the value of its real estate situate without the State deducted from the value of the stock. "The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where or in what manner or nature of property or security the capital stock may be invested. Whether that be invested in real estate or other property beyond the jurisdiction of this State, the latter having control over the shares and their true value, the peculiar nature and value of the investment of the capital stock of the corporation beyond the limits of the State can form no proper subject for specific deduction or abatement from the true value of the shares of stock when presented to be assessed for purposes of taxation.

It is exclusively with the shares of stock and their true value, as representing the entire corporate assets, that the tax commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to the real estate of the company situate within this State."

American Coal Co. *v.* County Comm'rs, 59 Md., 185.
Dwight *v.* Mayor, etc., 12 Allen, 316.
Nevada Bank *v.* Sedgwick, 104 U. S., 111.
Kelley *v.* Rhoades, 51 Pac. Rep., 593.

37 The question remains whether the individual stockholders were entitled to have their debts deducted from the value of their stock or, rather, whether the bank was entitled to have such deductions made from the valuation of the capital stock.

It appears that individual debts owed by resident shareholders were deducted from the value of their shares, but such deductions were refused non-residents by the assessing officers. The court, however, allowed the deductions also to be made as to non-residents. Certainly if shareholders who are residing in this State are entitled to deduct their debts from the value of their shares those who are residing in another State are likewise entitled. The law permits no discrimination between the two classes of shareholders in national banks, and the distinction attempted to be made by the assessing officers would be a clear and unjust discrimination in favor of resident owners of stock, and it would be difficult to assign any good reason therefor, for the non-resident, the same as the resident, stockholder may have debts which he owes in this State, and the capital of both alike is invested in the bank. No such discrimination is tolerated by the laws of this State or of the United States. Aside from the fact, however, that no such unfriendly discrimination can be permitted, by what authority can any such deduction be made whether the stock be held by a resident or non-resident? In vain have we searched the constitution and statutory provisions of this State relating to the subject of taxation for the existence of such a power, and none has been pointed out by counsel on either side. The constitution provides for the deduction of "debts" from "credits," but, as we have seen, that provision does not au-

thorize a deduction of "debts" from "stocks." Stocks are not credits any more than credits are stocks within the
38 definition of the statute respecting the term "credit." As has already been observed, "credits" and "stocks" under our system of taxation are separate and distinct species of property. Neither one includes the other, and as the framers of our constitution have seen fit to single out and mention "credits" as the kind of property from which "debts" might be deducted, they have expressed an intention to prohibit the deduction of debts from any other species of property. The expression of the one excludes every other kind. No doubt the banking corporation in its capacity as an artificial person—as a distinct entity—has the right to have its debts contracted by it in the conduct of its banking business deducted from its credits or the moneyed capital employed, for that is necessary to determine the real value of the stock, which value amounts simply to what can be realized from the property of the corporation after its obligations are paid. This will reduce the value of the credits or capital in the amount of the debts, and as the value of the credits or capital enters into the value of the shares, the value of the shares will be proportionately reduced for the purpose of the assessment. In this way the individual shareholder receives the benefit of the deduction of debts from credits, and such is the only way in which he is entitled to any deduction from the value of his stock; but the law does not authorize the bank to deduct debts disconnected from the banking business, nor the bank or shareholder to have his individual debts deducted from the value of his shares of stock. The debts incurred in the conduct of the corporate business are deducted from the credits or moneyed capital, so that the actual value of the capital employed may be determined and the taxes levied thereon.

39 Under the system of taxation prescribed by the constitution and statutes of this State, a banking corporation, State or national, has the same immunity from excessive taxation and the same right to deductions of debts from credits as any other corporation or any private person has, but "to place the holder of national bank shares into the class of bankers and treat his shares as stocks until the net value is fixed, and then change his stock into a credit, and take him out of the class of bankers and place him into the class of private individuals so as to enable him still further to reduce his stock thus changed into a credit by deducting therefrom his legal *bona fide* debts, would be discriminating in favor of such national bank shareholder and would be giving him two chances to escape taxation while other bankers and private individuals have but one."

Chapman *v.* National Bank of Wellington, 56 Ohio St., 310.
National Bank of Wellington *v.* Chapman, 178 U. S., 205.
Dutton *v.* National Bank, 53 Kans., 440.
Bressler *v.* County of Wayne, 32 Neb., 834.
People *v.* Dolan, 36 N. Y., 59.
National Bank *v.* King County, 9 Wash., 608.

First Nat. Bank of St. Joseph *v.* Tp. of St. Joseph, 46 Mich., 526.
First Nat. Bank *v.* Chehalis County, 6 Wash., 64.
Williams *v.* Weaver, 75 N. Y., 30.
McVeagh *v.* City of Chicago, 49 Ill., 318.

Nor are the provisions of our constitution and statutes respecting taxation in conflict with section 5219 of the Rev. Stat. of the United States, which reads as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the
40 taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same exent, according to its value, as other real property is taxed."

In this section the legislature of every State is given express power to include within the subjects of taxation the "shares of national banking associations located within the State," subject, however, to the restrictions that such shares shall not be taxed at a greater rate than "other moneyed capital in the hands of individual citizens of the State," and that those owned by non-residents "shall be taxed in the city or town where the bank is located, and not elsewhere."

Examination and comparison will show that the several sections of the constitution and revised statutes of this State hereinbefore construed are entirely in harmony with the Federal statute. No purpose to discriminate against shareholders in national banks is manifest. The taxation of the shares and property of the two classes of banks, State and national, is precisely the same, and such shares and property are taxed at no higher rate than is the property of other corporations and of individuals. The assessment of all taxable property, whether of corporations or individuals, must be at its full cash value. Nor is it shown that the system of taxation pursued in this State discriminates in any way material in its practical operation against the holder of shares in national banks.

41 Under our laws such shares, the same as shares in State banks or other corporations, are known as stocks or investments in stock, and are not credits from which debts can be deducted. Such stocks are not to be assessed at a different rate in one institution than in another. Stocks in national banks, in incorporated State banks, and in unincorporated banks are all subject to the same system of taxation, and we perceive no discrimination in favor of either class, nor as against either of those classes in favor of

private taxable property. By enacting the Federal statute Congress doubtless intended to establish a national banking system, so as to obtain a secure and uniform currency for the people and facilitate the operations of the Treasury of the United States. The banks, under this system, were to be furnished with private capital. The capital, so far as it was security for their circulating notes, was to be invested in United States bonds for the protection of the Government and the people. Neither these bonds nor the shares of stock held by individuals, nor the capital, however invested, nor the banks, were taxable by the States in which the banks were located without the consent of Congress. Such consent was granted and power to tax them conferred upon the States by Congress in the statute referred to, subject to the restrictions or limitations therein contained. Those limitations were doubtless necessary to prohibit discrimination in favor of State banks and individuals doing similar business, and the imposition of burdens which would prevent private capital from seeking investment in the institutions which it was the object of the enactment to establish and promote.

"The main purpose," says Mr. Justice Matthews in Mercantile Bank *v.* New York, 121 U. S., 138, "of Congress in fixing
42 limits to State taxation on investments in the shares of national banks was to render it impossible for the State in levying such a tax to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

There is nothing in the Federal statute which prohibits the deduction of debts from credits when such deductions do not constitute an unfriendly discrimination against national banks; nor does the term "moneyed capital," employed in that statute, require that where, as under our system of taxation, debts may be deducted from credits, the individual debts of a shareholder in a national bank must be deducted from the value of the stock. The term "moneyed capital," as there used, does not include money which does not come into competition with the business of the bank, and debts disconnected from such business cannot be deducted from the amount of the capital; nor can the shares of stock of such a bank be treated as credits. Therefore the refusal by the assessing officers, on application of the bank, to deduct the individual debts of non-resident shareholders from the value of the stock is not an illegal discrimination against a national bank, and hence no such deduction can be enforced by the bank.

First Nat. Bank of Garnett *v.* Ayers, 160 U. S., 660.
National Bank of Wellington *v.* Chapman, 173 U. S., 205.
Aberdeen Bank *v.* Chehalis County, 166 U. S., 440.
Bank of Commerce *v.* Seattle, 166 U. S., 463.
Mercantile Nat. Bank *v.* City of New York, 28 Fed. Rep., 776.
Richards *v.* Incorporated Town of Rock Rapids, 31 Fed. Rep., 505.

43 We are of the opinion that the court erred in rendering a decree in favor of the plaintiff. Judgment ought to have been entered in favor of the defendant for costs.

The case must therefore be reversed, with costs, and remanded, with instructions to the court below to set aside its decree and enter judgment in accordance herewith.

It is so ordered.

We concur.

MINER, *J.*

BASKIN, *J.*

44 In the Supreme Court of the State of Utah.

COMMERCIAL NATIONAL BANK, Plaintiff,
vs.
ALMA D. CHAMBERS, as Treasurer of Weber County, Utah, Defendant.
} Petition for Writ of Error.

Now comes the said Commercial National Bank, plaintiff herein, and says that on or about the 10th day of April, A. D. 1900, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

ABBOT R. HEYWOOD,
Attorney for Plaintiff.

[Endorsed:] 1163. Com'l Nat. Bk. *vs.* A. D. Chambers. Pet. for writ of error. Filed Apr. 18, 1900. Lilburn P. Palmer, clerk supreme court Utah.

45 In the Supreme Court of the State of Utah.

COMMERCIAL NATIONAL BANK, Plaintiff,
vs.
ALMA D. CHAMBERS, as Treasurer of Weber County, Utah, Defendant.
} Order Allowing Writ of Error.

This 18th day of April, 1900, came the plaintiff, by its attorney, and filed herein and presented to the chief justice of this court its petition, with assignment of errors, showing that a Federal question was involved, and praying for the allowance of a writ of error intended to be urged by him; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court

of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the chief justice of this court does allow the writ of error upon the plaintiff giving a bond, according to law, in the sum of one thousand dollars, which shall operate as a supersedeas bond.

G. W. BARTCH,
Chief Justice of the Supreme Court of the State of Utah.

[Endorsed:] 1163. Com'l Nat. Bk. of Ogden *vs.* A. D. Chambers. Order allowing writ. Filed Apr. 18, 1900. Lilburn P. Palmer, clerk supreme court Utah.

46 In the Supreme Court of the United States.

COMMERCIAL NATIONAL BANK, Plaintiff in Error,
versus
ALMA D. CHAMBERS, as Treasurer of Weber County, Utah, Defendant in Error.

Writ of Error to Supreme Court of Utah.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Utah, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in *which a decision could be had in* the said suit between The Commercial National Bank, plaintiff, and Alma D. Chambers, treasurer, defendant, as aforesaid, wherein was drawn in question the validity of an authority exercised under the statutes of said State, on the ground of the same being repugnant to the laws of the United States, and the decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of a statute of the United States and the decision was against the right claimed under such clause of said statute, a manifest error has happened, to the great damage of the Commercial National Bank, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties

47 aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 18th day of June, 1900, in the said Supreme Court to be then and there held, that, *in* the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, on the 18th day of April, 1900.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District of Utah.

[Endorsed:] 1163. Filed Apr. 18, 1900. Lilburn P. Palmer, clerk supreme court, Utah.

48 In the Supreme Court of the State of Utah.

COMMERCIAL NATIONAL BANK, Plaintiff,
vs.
ALMA D. CHAMBERS, as Treasurer of Weber County, Utah, Defendant. } Citation.

UNITED STATES OF AMERICA, *ss:*

To Alma D. Chambers, as treasurer of Weber county, Utah, and to George Halverson, Esq., his attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah, wherein The Commercial National Bank is plaintiff in error and you are defendant in error, and show cause, if any there be, why the judgment rendered against the said plaintiff it error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Bartch, chief justice of the supreme court of Utah, this 18th day of April, A. D. 1900.

G. W. BARTCH,
Chief Justice Supreme Court of Utah.

I hereby, this 20 day of April, 1900, accept due personal service of this citation on behalf of Alma D. Chambers, defendant in error.

GEORGE HALVERSON,
Attorney for Defendant in Error.

[Endorsed:] 1163. Citation.

49 In the Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Nine Hundred.

COMMERCIAL NATIONAL BANK, Plaintiff in Error,
vs.
ALMA D. CHAMBERS, as Treasurer of Weber County, Utah, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the first Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Commercial

National Bank, by Abbot R. Heywood, its attorney, and says that in the record and proceedings of the supreme court of Utah aforesaid there is manifest error, in this, to wit:

1. That by the action of the taxing officers and the supreme court of Utah herein the shareholders of plaintiff in error are, contrary to the provisions of section 5219, Revised Statutes of the United States, subjected to taxation upon their respective shares at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State of Utah.

2. That by the action of the taxing officers and the supreme court of Utah herein there is worked against these shareholders a clear discrimination in favor of moneyed capital other than that employed in national banks.

3. That by the action of the taxing officers and the supreme court herein the shareholders of plaintiff in error were and are de-
50 nied the equal protection of the laws.

That by the record aforesaid it appears that the judgment aforesaid was given for said Chambers against the said Commercial national bank, whereas by the law of the land the said judgment ought to have been given for the said Commercial national bank against the said Chambers, and the said Commercial National Bank prays that the said judgment of the supreme court of Utah may be reversed and annulled and altogether held for nothing, and that it may be restored *of* all things which it has lost by the occasion of said judgment.

ABBOT R. HEYWOOD,
Attorney for Plaintiff in Error

[Endorsed:] 1163. Assignment of errors. Filed Apr. 18, 1900. Lilburn P. Palmer, clerk supreme court, Utah.

51 In the Supreme Court of the State of Utah.

COMMERCIAL NATIONAL BANK OF OGDEN, Plaintiff in Error,
v.
ALMA D. CHAMBERS, as Treasurer of Weber County, Utah, Defendant in Error.
} Bond.

Know all men by these presents that The Commercial National Bank of Ogden, as principal, and T. D. Ryan and Richard T. Hume, as sureties, are held and firmly bound to the defendant in error, Alma D. Chambers, in the full and just sum of one thousand dollars ($1,000.00), to be paid to the said defendant in error, Alma D. Chambers, his certain attorneys, administrators, executors, or assign; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of April, A. D. 1900.

Whereas lately, at a supreme court of the State of Utah, in a suit

depending in said court between the said parties as above, a judgment reversing the judgment of the second district court of the said State of Utah was rendered against the above plaintiff, and it having obtained a writ of error and filed a copy thereof in the office of the clerk of the Supreme Court of the United States to reverse
52 the judgment in the aforesaid suit, and a citation directed to the said Alma D. Chambers, citing and admonishing him to be and appear at a session of the Supreme Court of the United States within sixty days from the date of the said citation, to wit, the 18th day of April, 1900:

Now, the condition of the above obligation is such that if said plaintiff in error shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

COMMERCIAL NATIONAL BANK OF OGDEN. [SEAL.]
T. D. RYAN. [SEAL.]
RICJARD T. HUME. [SEAL.]

Sealed and delivered in the presence of—
T. R. O'CONELLY.

STATE OF UTAH, } ss:
County of Weber, }

T. D. Ryan and Richard T. Hume, the sureties in the above bond, being first duly sworn, each for himself says—

That he is a resident and freeholder within Weber county, Utah, and worth the amount specified in said bond as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

T. D. RYAN.
RICHARD T. HUME.

Subscribed and sworn to before me this 19th day of April, A. D. 1900.

T. R. O'CONNELLY,
Notary Public, Weber County, Utah.

The foregoing bond and security for costs was taken by me and is hereby approved this 23rd day of April, 1900.

G. W. BARTCH,
Chief Justice Supreme Court of Utah.

53 UNITED STATES OF AMERICA, } ss:
State of Utah, County of Salt Lake, }

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, in pursuance of a writ of error, wherein The Commercial National Bank of Ogden is plaintiff in error and Alma D. Chambers, as treasurer of Weber county, Utah, is defendant in error, do return

attached hereto a transcript of the record and proceedings, together with the original citation, petition for writ, allowance of writ, writ of error, and the assignment of errors, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record and proceedings, opinion, and bond are full, true, and correct copies of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand affix the seal of the supreme court of Utah this the 26th day of April, A. D. 1900.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

LILBURN P. PALMER,
Clerk Supreme Court of Utah.

Endorsed on cover: File No., 17,745. Utah supreme court. Term No., 270. The Commercial National Bank, plaintiff in error, *vs.* Alma D. Chambers, as treasurer of Weber county, Utah. Filed May 9, 1900.

270

BRIEF OF PLAINTIFF IN ERROR.

Filed [illegible], 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE COMMERCIAL NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

ALMA D. CHAMBERS, AS TREASURER OF WEBER COUNTY, UTAH.

IN ERROR TO THE SUPREME COURT OF THE [illegible] STATE OF UTAH.

FILED [illegible], 1900.

25881

SUPREME COURT OF THE UNITED STATES,

October Term, 1900.

No. 270.

COMMERCIAL NATIONAL BANK,
Plaintiff in Error,

vs.

ALMA D. CHAMBERS AS TREASURER OF WEBER COUNTY.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was brought by plaintiff in error hereinafter called Bank, to restrain the collection of the illegal portion of the taxes levied against its shareholders for the year 1898.

The case involves simply the carrying out of the statute law of deductions (not the construction) enacted in conformance with Sec. 5219 R. S. U. S., and the decisions of the Supreme Court of the United States thereon. It being insisted that the record easily shows that by the action of the taxing officer and the supreme court of Utah the shareholders of the Bank were treated contrary to the provisions of Sec. 5219 R. S. U. S., and further, that they were denied the

equal protection of the laws. The sections of the Revised Statutes of Utah applicable are as follows:

> "**Section 2506, Rev. St.**, requires all property to be 'assessed at its full value,' agreeably to Section 2 of the constitution."
>
> "**Section 2507, Id.**, reads: 'The stockholders in every bank or banking association organized under the authority of this state or of the United States, must be assessed and taxed on the value of their shares of stock therein, in the county, town, city or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. To aid the assessor in determining the value of such shares of stock, the cashier or other accounting officer of every such bank must furnish a verified statement to the assessor showing the amount and number of shares of the capital stock of each bank, the amount of its surplus or reserve fund or undivided profits, amount of investments in real estate, which real estate must be assessed to said bank and taxed as other real estate, and the names and places of residence of its stockholders, together with the number of shares held by each."
>
> **2508, Id. Deductions.** "In the assessment of the shares of stock mentioned in the next preceding section, each stockholder must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this state, and the assessment and taxation must not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state." ['96, p. 426.
>
> **2509, Id.** In making such assessment, there must also be deducted from the value of such shares, such sum as is in the same proportion to

such value as the assessed value of the real estate of such bank or banking asociation in which such shares are held, bears to the whole amount of the capital stock, surplus, reserve, and undivided profits of suchbank or banking association. ['96, pp. 426-7.

2518. What debts deductible from credits. In making up the amount of credits which any person is required to list he will be entitled to deduct from the gross amount of such credits the amount of all bona fide debts owing by him, but no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, must be considered a debt within the intent of this section; and no person is entitled to a deduction on account of an obligation of any kind given to an insurance company for the premium of insurance, nor on account of any unpaid subscription to any institution or society, nor on account of a subscription to or instalment payable on, the capital stock of any company or corporation; and no liability of any person or persons, company or corporation, as surety for another must be deducted; and no other liability of any person or persons, company or corporation, on any bond or undertaking must be deducted; and no deduction must be made in any case unless the party claiming such deduction discloses to the assessor, under oath, the name or names of the persons to whom such party is indebted, and the amount of such indebtedness to each, and also that such indebtedness is not barred by the statute of limitations, or, in case such indebtedness is so barred, acknowledges such indebtedness in writing, duly subscribed. No debt is to be deducted unless the statement shows the amount of such debt, as stated under oath in the aggregate. Whenever one member of a firm or one of the proper officers of a corporation has made a statement showing the property of the firm or corporation,

another member of the firm or another officer need not include such property in the statement made by him; but this statement must show the name of the person or officer who made the statement in which such property is included. The fact that such statement is not required, or that a person has not made such statement under oath, or otherwise does not relieve the property from taxation. ['96, pp. 425-6, 430.

A deduction of debts from credits may be authorized, Con. art. 13, sec 3.

The portions of the constitution applicable are as follows:

Article XIII, Sec. 2. [What property taxable. Definitions. Revenue.] All property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word property, as used in this article, is hereby declared to include monies, credits, bonds, stocks, franchises, and all matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stocks, has been taxed. The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. For the purpose of paying the state debt, if any there be, the legislature shall provide for levying a tax annually, sufficient to pay the annual interest, and principal of such debt, within twenty years from the final passage of the law creating the debt.

Sec. 3. [Legislature to provide uniform tax. Exemptions.] The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to

its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: *Provided, That a deduction of debts from credits may be authorized.*

The law enacted by congress in point is found in

Section 5219 of the Revised Statutes of the United States, which reads as follows: "Nothing herein shall prevent all the shares from any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The bank, as required by Sec. 2507 above, furnished the tax assessor with a verified statement to aid him in determining the value of its shares of stock, which statement was accepted by the assessor (Record p. 9). The bank also furnished him a list of its real estate, which latter included some owned in California and Idaho of assessed value of $19,000.

The assessor in making the assessment deducted from the assessed value of the shares ($80) the assessed value of the real estate in Weber County, Utah, but refused to deduct for

that situate in California and Idaho (Findings 7 and 8, Rec. p. 10). He also deducted the bona fide debts of local shareholders, but refused such deductions to Edw. Conant and H. O. Harkness on the ground that being non-residents they were not entitled thereto.

Whereupon the bank made application to the Board of Equalization (Rec. p. 11) to have these additional deductions made. Upon their refusal the bank, at the proper time, paid the tax upon the real estate and tendered the amount that would be due from the shareholders provided these deductions were made (Findings 14 and 15, Rec. p. 13). The tender being rejected, the bank brought this action, claiming the deductions granted by Sections 2508 and 2509 and obtained an injunction against the levy and sale.

The trial court, following the statute, made a decree in favor of plaintiff bank. The Supreme Court reversed that decision, whereupon the bank brings to this court by writ of error.

II.

The errors relied upon are set out in a word under the argument, coming, however, within the specifications:

That by the action of the taxing officer and the Supreme Court of Utah "that the shareholders of the bank, in view of the express provisions of the Utah Statute, are by this decision taxed, contrary to the provisions of 5219 R. S. U. S., at a greater rate than other moneyed capital, and that thereby a discrimination has been worked against these shareholders in favor of other moneyed capital, and

2nd. That they (the shareholders) have been denied the equal protection of the laws (Rec. p. 31).

III.

ARGUMENT.

The issues presented are:

First—Are the non-resident shareholders entitled to the deductions set out in Section 2508?

Second—Should the assessed value of the California and Idaho real estate be deducted from the value of the shares? (See Sec. 2509 above).

There is no contention that the tax was not assessed nor that no statement was furnished the assessor as provided. (See opinion Rec. p. 21, opp. side p. 32).

The case at bar differs wholly from those heretofore decided by this court on these points, in that none of the states from which those cases came up had our Sec. 2508 or any of its provisions.

It has never been said by any court heretofore that national banks were not entitled to the protection of the state constitution and laws enacted thereunder in harmony with Sec. 5219 R. S. U. S.

Here, however, with the words of Sec. 2508:

> "Each stockholder *must be allowed* all the deductions and exemptions allowed by law in assessing the value of other taxable personal property *owned by individual citizens* of the state"

Before them, the court not only decides against the non-residents, but go beyond the issues and say that

No shareholder can have the deductions that are therein expressly granted. What are these deductions? Sec. 2518 contains them, being the only section on that subject.

If the words of the opinion found at the bottom p. 21 of

the record were intended to be a construction of Sec. 2508 then the following words taken from Thornley vs. United States, 113 U. S. on p. 313, can be appropriately quoted:

> "Where the meaning of the statute is plain, it is the duty of the courts to enforce it according to its obvious terms," citing several authorities.

So in this case; the section (2508) says the shareholders must have all the deductions allowed in assessing other taxable personal property owned by individual citizens. Sec. 2518 shows the deductions this individual citizen gets and the constitution itself shows that the word property includes this word "credits." See Art. XIII, Sec. 2, above. If credits be property it can need no construction to know that they are included in personal property mentioned in 2508. There is nothing to construe; nothing could be more obvious than the words used, nor in the light of our Constitution (passed May 8, 1895) and the history of the law as had been theretofore laid down by the courts, could there have been a more apt statute. A reference to the brackets at the end of the sections printed hereinbefore shows that they were taken from the laws of 1896. Down to that year the Supreme Court of the United States and a large majority of the courts of last resort of the several states, had declared that these deductions must be allowed to shareholders.

People vs. Weaver, 100 U. S., 539.
Watson vs. First National Bank, 107 Indiana, 206.
McAden vs. Commissioners Mecklenburg Co., 97 N. C., 355.

The two latter cases collate the authorities.

In enacting Sec. 2508 our legislature elected to codify the law as had been declared up to that year, thus making it certain and a positive authority to the assessor for the

future. The constitution especially permitted this. (See last line of Sec. 3, Art. XIII, quoted heretofore).

In not a state from which the contrary authorities are cited did they have this section; the only deduction allowed in the statutes of those states being for real estate. Nor did this section (2508) appear on the statute books of Utah prior to 1896. It was a new enactment entirely, being approved April 5th, 1896.

The motive for this law (2508) is easily ascertained by referring to the case of Bank vs. Ayers, found in 160 U. S., 660, decided on January 27, 1896. The concluding words of the opinion, which read as follows:

> "The single fact that the statute of Kansas permits some debts to be deducted from some moneyed capital but not from that invested in the shares of national banks, is not sufficient to show such violation"

Gave the legislature the cue and they thereupon enacted a new law wherein there was expressly and in words that are plain, granted to Bank shareholders all the deductions that individual citizens had.

The case of First Nat. Bank vs. Chapman, 173 U. S., 205, decided Feb. 27, 1899, quotes the Ohio tax revenue law showing that that state has no such section as our 2508.

Sec. 2509 (which is common to nearly all states) allowing deductions for real estate, is no clearer in language than 2508, and yet no court has ever thought it needed any construction, but all have applied it according to its terms.

It is respectfully urged that the action of the supreme court of Utah in denying these shareholders the deductions that are in no mistakeable terms granted in Sec. 2508 is not only obnoxious to Sec. 5219 R. S. U. S. but also is a denial to these shareholders of the equal protection of the laws.

These words from the opinion in ex-parte Commonwealth of Virginia, 100 U. S., 339, are here taken down, believing that they are authority herein:

> "We have said the prohibitions of the 14th amendment are addressed to the states. They are: 'No STATE shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to the actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning."

The Utah legislature having so plainly shown what their purpose was by enacting Sec. 2508, the shareholders of plaintiff in error are entitled to the protection of its provisions.

In no manner can that section ever be used other than in the way claimed by these shareholders.

With the utmost respect but with earnestness it is submitted that the action of the supreme court of Utah is but an absolute refusal to recognize the law.

The Utah legislature say that these shares must be

assessed at their full cash value, (Sec. 2506) which was done, (See Finding 7, Rec. p. 10) and the information therefor fully furnished by the Bank. (Finding 3, p. 9).

That part of the law (Sec. 2506) having been enforced, as it should be, it is asked that Sec. 2508 be also given effect.

The lines of the opinion of the supreme court of Utah found at the bottom of p. 24 of the record, wherein it is said that counsel on neither side had pointed out any statutory provision for these deductions seems unaccountable.

A copy of respondent's brief (plaintiff in error here) in that court is filed herewith with the request that if it become material a reference be made to bottom p. 15 thereof, and also bottom p. 23, and indeed all the portion of that brief devoted to the merits. The statute was therein repeatedly called to the court's attention.

The other question was the claim for deductions for the assessed value of the real estate situate in California and Idaho.

The supposition in the opinion (l. c. p. 23 Rec.) "that three-fourths of the Bank's property might be in another state," for many and obvious reasons is not a supposable case. This real estate has to pay taxes where it is located and if included in the value paid on the stock would be of course double taxation. The opinion of the trial judge on that point is here inserted as fairly expressing the legal situation:

> JUDGE ROLAPP—"As to the other deduction claimed by the plaintiff, for the assessed value of real estate situate outside of the state of Utah, I am equally of the opinion that such deduction should be made. A stockholder in national banks can only be assessed for the market value of such stock. Abstractly speaking the stock has no value, but stands only as an equivalent for the value of the property of the corporation. If part of the property already

> pays tax, whether in this state or elsewhere, and the shares were again to be taxed for the value of the whole or a part of such property, clearly that would amount to double taxation, and would be invalid upon all principles of taxation."

If, then, the result be double taxation, the action of the supreme court of Utah cannot be claimed as a construction of any of her laws, but would be a decision contrary to the spirit of Sec. 5219 R. S. U. S. and to the provisions of our Sec. 2509.

As to the remedy: If these deductions should have, as we claim, been allowed, then to that extent the tax was illegal and the bank on paying the tax on the real estate and tendering the amount of the legal part of the tax on the shares, complied with Section 2683 of the statutes and became at once authorized to an injunction against this illegal excess, and indeed this was the appropriate mode of relief. (Sec. 2683, authorizes an injunction for the illegal portion of a tax.)

> See also Pelton vs Commercial National Bank, 11 Otto, 143.
> Cummings vs. Merchants' National Bank, 11 Otto, 153.

The stockholders refused to pay this illegal excess (see finding 12 A, Rec. p. 12) and had a right to.

> See Cummings vs. Bank, *supra*.

And this action was properly brought by the Bank for the stockholders.

> Cummings vs. Bank, *supra*.
> Hills vs. Nat. Ex. Bank, 15 Otto, 319.

It is respectfully urged that the supreme court of Utah should be reversed.

Respectfully submitted,

ABBOT R. HEYWOOD,

Attorney for Plaintiff in Error.

No. 270.

25887

Brf. of Kimball for Def.

Office Supreme Court U. S.
FILED
DEC 5 1900
JAMES H. McKENNEY,
Clerk.

BRIEF FOR DEFENDANT IN ERROR.

Filed Dec. 5, 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 270.

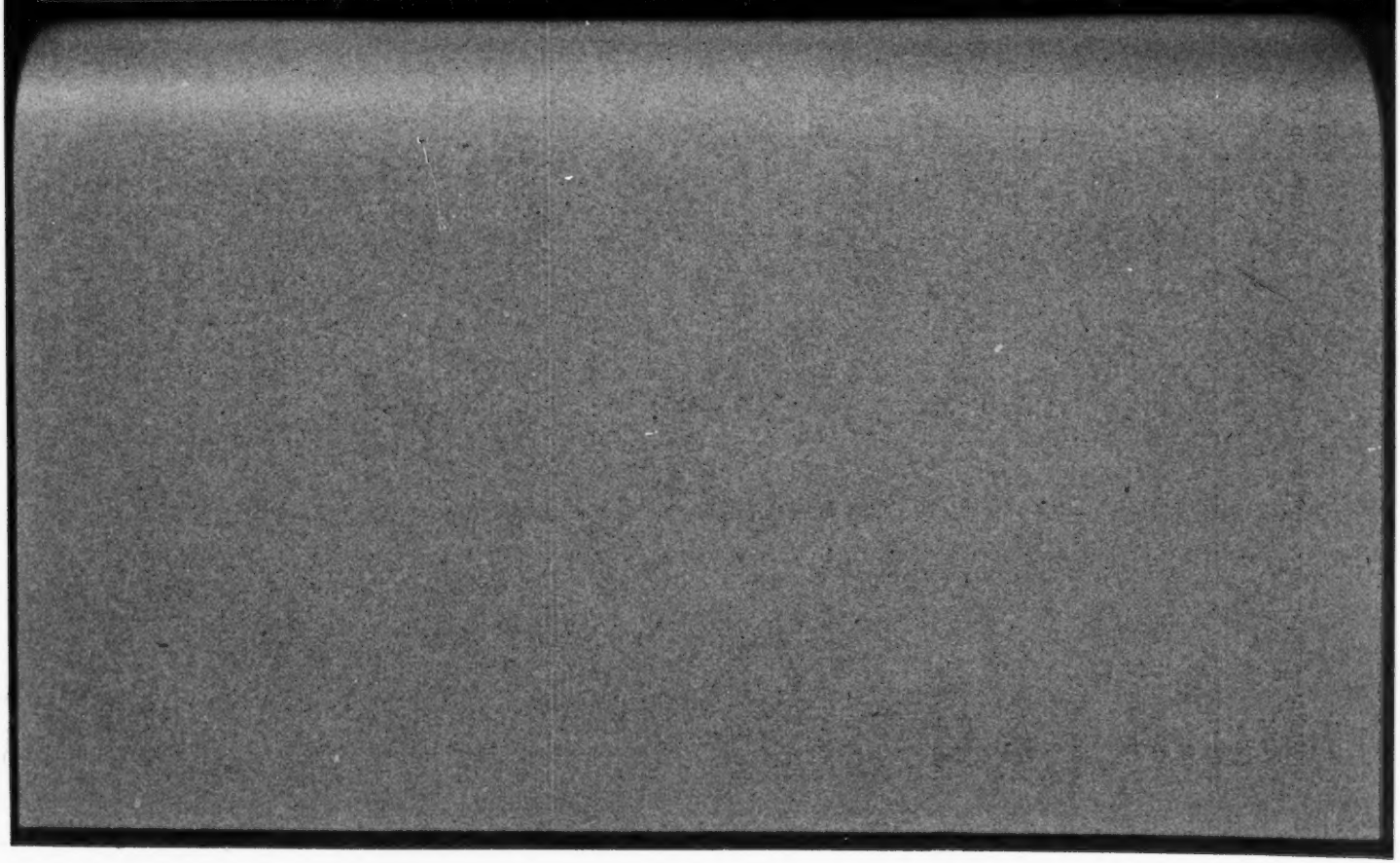
THE COMMERCIAL NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

ALMA D. CHAMBERS, AS TREASURER OF WEBER COUNTY, UTAH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED ..... 1900.



25888

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 270.

THE COMMERCIAL NATIONAL BANK,
PLAINTIFF IN ERROR,

vs.

ALMA D. CHAMBERS, AS TREASURER OF WEBER COUNTY, UTAH,
DEFENDANT IN ERROR.

Brief for Defendant in Error.

In this action the plaintiff in error obtained a judgment in the District Court of the Second Judicial District of the State of Utah in behalf of its stockholders adjudging that the taxes levied by the Assessor of Weber County, on its shares of stock, for the year 1898 in excess of $612.99 was invalid and wholly void, and perpetually enjoining the defendant in error from collecting such excess. (Record, page 14).

This judgment was based upon the findings of fact made by said Court, and found in the Record from pages 9 to 14, both inclusive, which findings of fact must be taken as true on this hearing.

On appeal to the Supreme Court of Utah, that Court on April 10th, 1900, reversed said judgment and directed the said district court to set aside its judgment, and enter judgment for defendant in error for costs, (Record, pages 18 and 28).

The plaintiff in error claims that there is error in the judgment of the Supreme Court of Utah in this: that that Court held that neither it nor its stockholders were entitled to have deducted from the valuation of its shares, real estate situated in the states of California and Idaho, valued for taxing purposes at $19,500 and held that its stockholders Conant and Harkness were not entitled to have deducted from the valuation of their shares, the bona fide debts owing from them to it.

The assessor of Weber County, on the advice of counsel, refused to make these deductions at the time of leveying the tax on the shares of the bank, (Finding 8, Record, page 10) and his refusal to allow deductions to Conant and Harkness was put upon the ground that they, being non-residents, were not entitled to such deductions, (Finding 9, Record, page 11) and at the same time allowed such deductions to resident stockholders from the value of their shares. (Finding 6, Record, page 10).

ARGUMENT.

I.

The claim of plaintiff in error, by its counsel's brief, is that these deductions are provided for and allowed by sections 2 and 3 of Article 13 of the Constitution of Utah, and sections 2508 and 2509 of the Revised Statutes of Utah, and that section 2518 of said Revised Statutes designates the debts which can be deducted, and that the assessor in refusing to make these deductions was acting in violation of the statute law of Utah.

If this claim is well founded, then there is no federal question raised by the record, and this Court has no jurisdiction of this action.

The law itself makes no discrimination against the bank or its stockholders in favor of other moneyed capital, and certainly the record does not show that either the taxing officers, or the Supreme Court of Utah have made any discrimination against the bank or its stockholders in favor of other moneyed capital.

The utmost that can be claimed from the record is that the taxing officers discriminated against the non-resident stockholders, Conant and Harkness, and in favor of the resident stockholders of this bank, by allowing deductions of debts from the value of their shares and refusing such deductions to Conant and Harkness, and violated the express provision of the State law in refusing to deduct the value of the foreign real estate.

How can this action of the taxing officers be in conflict with or contrary to the provisions of Section 5219 of the Revised Statutes of the United States? It cannot.

The utmost that can be claimed for it is, that the officer by allowing the deductions to the resident stockholders and refusing it to the non-resident ones gave the resident ones an immunity or privilege, which he denied to the non-resident ones and is therefore obnoxious to the provisions of the first clause ot Section 12 of the Constitution of the United States, and thus raises a federal question.

But such claim is not tenable. Before this Court can take jurisdiction it must appear that the law of Utah gives the immunity or privilege. The arbitrary action of the officer is not sufficient. The section of the Constitution of Utah, and of the Revised Statutes applicable to this subject are set out in the brief of counsel for the bank, and they provide for a uniform rate of taxation and entitle all taxpayers, whether resident or non-residents, to the same deductions.

Indeed, the counsel for the bank admits and contends that such is the law.

Besides the Supreme Court of Utah in its opinion in this cause, after quoting section 2508 of the Revised Statutes, construed said section as entitling non resident stockholders to all the deductions allowed to resident ones in the following language:

> "Under this provision every stockholder of a bank, whether a resident or non-resident, is entitled to, and must be allowed all the deductions and exemptions in the assessment of their shares as are allowed in the taxation of other personal property owned by a resident citizen." (See Record, bottom of page 21).

> "It appears that individual debts owed by resident shareholders were deducted from the value of their shares, but such deductions were refused non-residents by the assessing officers. The Court however, allowed the deductions also to be made as to non-residents. Certainly if shareholders who are residing in the state are entitled to deduct their debts from the value of their shares those who are residing in a nother state are likewise entitled. The law permits no discrimination between the two classes of shareholders in national banks, and the distinction attempted to be made by the assessing officers would be a clear and unjust discrimination in favor of resident owners of stock, and it would be difficult to assign any good reason therefor, for non-resident, the same as the resident stockholder, may have debts which he owes in this state, and the capital of both alike is invested in the bank. No such discrimination is tolerated by the laws of this state or the United States. Aside from the fact, however, that no such unfriendly discrimination can be permitted, by what authority can any such deduction be made, whether the stock be held by a resident or non-resident? In vain have we searched the Constitution and statutory provisions of this state relating to the subject of taxation for the existance of such a power, and none has been pointed out by counsel on either side." (Record page 24).

Here then is a direct holding that neither class of stockholders is

by the Constitution and laws of the State entitled to deduct debts from the value of their stock. By this construction this Court is bound.

People of the State of N. Y. vs. Weaver, 10 Otto 539.

First National Bank of Garnett vs. Ayers, 160 U. S. 660.

There are many other decisions of this Court to the same effect, but these only are cited because they are on the subject of taxation

Counsel for plaintiff in error in his brief says:

"The case involves simply the carrying out the statute law, (meaning the statute of Utah) of deductions enacted in conformance with Section 5219 Revised Statutes of the U. S. and the decisions of the Supreme Court of the United States thereon."

Thus admitting that the Statutes of Utah, relative to taxation do not conflict with the Statute of the United States or the decisions of this Court upon the subject of taxation of National Bank shares by the states. By this admission, he takes out of the case all questions of a federal nature, so far as they can arise under Section 5219, Revised Statutes of the United States.

For the refusing of deductions of debts to non-resident stockholders and allowing them to resident ones is not taxing the bank shares at a greater rate than other "moneyed capital in the hands of individual citizens," but is taxing the capital of non-residents at a greater rate than is assessed on the capital of residents invested in the same concern.

And the refusal of the Court to allow the deduction of the value of the foreign real estate, raises no federal question on the record in this case, because it no where appears that such deductions were allowed to any other person or corporation. But as to whether the laws of Utah permitted or allowed the deductions claimed by the plaintiff in error, after all, depends upon the construction of the Utah Constitution and taxing laws, notwithstanding the fact that counsel claims that the construction of these laws is not involved in the cause.

And in discussing this question, we cite in addition to the Revenue Statutes of Utah set out in plaintiffs brief the following, towit:

"Section 2505. Whenever the terms mentioned in this section are employed in this title, they are employed in the sense hereafter affixed to them towit:

"1. The term 'property' includes moneys, credits, bonds, stocks; franchises, and all other matters and things, real, personal, and mixed capable of private ownership. * * *

"6. The term 'credit' means those solvent debts, secured or unsecured, owing to a person.

"7. The term 'debts' means those secured or unsecured liabilities owing by a person.

"8. The term 'person' as used in this title shall be construed to include partnerships, corporations, and associations of persons.".

It will be observed that in the assessment of the shares of stock in banks, wether national or otherwise each stockholder must be allowed all deductions and exemptions allowed by law in assessing the value of other taxable property owned by individuals.

Revised Statutes of Utah, Sec. 2508.

This is construed and interpreted by counsel for the bank to mean that if any deductions are allowed to individuals from the valuation of any of their personal property then the stockholders of the bank are entitled to such deductions from the value of their shares.

But it will be observed that the only personal property from which individual citizens can deduct their debts is the sum total of their credits, viz; "solvent debts secured or unsecured." Revised Statutes of Utah, Section 2518.

It is too plain for argument that the only property from which debts can be deducted is "credits" and the counsel for the bank well says: "that when the Statute is plain it is the duty of the Courts to enforce it according to its obvious terms."

While the term "property" includes "stocks," "credits" etc., the property is classified into moneys, credits, bonds, stocks, real estate etc.

Subdivision 1, Section 2505, Revised Statutes of Utah.

And while "personal" property, includes all these classes except real estate, it is plainly apparent that the Legislature intended to limit the deduction of debts to credits as defined by it, and meant no more than this when it said in Section 2508 that "stockholders must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual

citizens of the state. And such was the construction of the statute by the Supreme Court of Utah in this case. Record, page 24. And by this construction this Court is bound.

The People vs. Weaver, supra.

First National Bank of Geneva vs. Ayers, supra.

And that this was the intention of the legislature more clearly appears because its constitutional power only extended to the allowance of debts from credits.

Sec. 3 Article 13, Constitution of Utah.

The Statutes of Utah relative to taxation of bank shares and the construction put thereon by the Supreme Court of Utah come within the rule announced by this Court in several cases.

Mercantile National Bank of the City of New York vs. Mayor, Aldermen and Commonalty of the City of New York and George W. McLean, Receiver of taxes 121 U. S. 138.

First National Bank of Garnett Kansas vs. R. H. Ayers et al 160 U. S. 660.

First National Bank of Wellington vs. H. B. Chapman, 173 U. S. 205.

National Bank of Commerce vs. City of Seattle 166 U. S. 721.

First National Bank of Aberdeen, vs. County of Chehalis, 166 U. S. 440.

II.

Did the Supreme Court of Utah err in holding that the value of the California and Idaho real estate could not be deducted from the value of the banks shares?

We contend that it did not: The Constitution of Utah provides, Article 13, Section 2:

"All property in the state, not exempt under the laws of the United States or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word property, as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to

authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stocks, has been taxed. * * "

In pursuance of this constitutional provision the legislature provided in the following sections for assessing bank stock and real estate.

Section 2506 of the Revised Statutes 1898, provides: "All taxable property must be assessed at its full cash value. Land and improvements thereon must be separately assessed."

Section 2507, "The stockholders in every bank or banking association organized under the authority of this state or of the United States, must be assessed and taxed on the value of their shares of stock therein, in the county, town, city, or other district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. To aid the assessor in determining the value of such shares of stock, the cashier or other accounting officer of every such bank must furnish a verified statement to the assessor showing the amount and number of shares of the capital stock of each bank, the amount of its surplus or reserve fund or undivided profits, the amount of investments in real estate, which real estate must be assessed to said bank and taxed as other real estate, and the names and places of residence of its stockholders, together with the number of shares held by each."

Section 2509. "In making such assessment there must also be deducted from the value of such shares, such sum as in the same proportion to such value as the assessed value of the real estate of such bank or banking association in which such shares are held, bears to the whole amount of the capital stock, surplus, reserve, and undivided profits of such bank or banking association."

It will be seen from the foregoing provisions that the real estate is assessed to the bank and taxed as other real estate, and to avoid double taxation, the value of the real estate is deducted from the value of the bank stock. That was done in this case, so far as the real estate situate in the State of Utah is concerned, but the plaintiff claims that it has $19,500 worth of real estate situate outside the State of Utah, and claims that that should be deducted. All the property of the bank, wherever situate enters into and constitutes a part of the market value of the stock. The stock is merely the

representative of value of all the property of the bank, including the franchise. Destroy any part of the property of the bank, and the stock depreciates to that extent. Add to the value of the property of the bank and you add to the value of the bank stock. "The value of these shares is made up by summing up all real and personal property, moneys, credits, stock in other companies, and effects of every character and description, and deducting therefrom lands which are specifically taxed, and all debts, obligations, and liabitities, no matter how secured, or of what kind. The net value of a share is the only amount that can be realized from the property of the company after its obligations are paid. It is true, in making the assessment, neither the assessor nor the bank, nor the stockholder, is required to go through the process of determining the value of the stock in this manner, but it is fixed at its true value, which can, of course, only be determined from the amount of its assets and liabilities. It is apparent that the holders of stock in banks and other corporations have a material advantage over private individuals, in that they are, in effect allowed to deduct from the value of all their assets, real property alone excepted, all their indebtedness of every kind and character. In this respect, money invested through the medium of corporations has a very great advantage over that invested by individuals in personal property."

Dutton vs. Citizens National Bank, 36 Pac., 721.

The constitution and the statutes provide that all property shall be taxed at its full cash value. Yet if the real estate situate outside the state of Utah is deducted from the value of the stock, to that extent it is not taxed at its full cash value—and although the statute as well as the act of congress, provides that the stock shall be taxed where the bank is situate and not elsewhere, yet, according to plaintiff's contention, if all the property of the bank were real estate situate outside the State of Utah, the stock would pay no tax where the bank is situate and still it might be worth one hundred cents on the dollar. Such a construction would be unconstitntional as well as in conflict with section 5219 of the Revised Statutes of the United States which provides that the shares of stock may be taxed by the state in the city or town where the bank is located and not elsewhere. The statute authorizing a deduction of real estate, simply refers to the real estate of the bank situate within the state and not elsewhere, otherwise the statute would be unconstitutional.

American Coal Co. vs. County Commissioners 59 Md. 185.

Dwight vs. Mayor &c. 12 Allen 316.

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And where two constructions can be given to a statute, one constitutional and the other unconstitutional, the court will adopt that construction which sustains the statute. The fact that the real estate may have paid a tax for the same year, in some other state—although that is not shown in this case—will not exempt the property from taxation in this state.

Rhoades vs. Kelly, 51 Pac., 593 and cases there cited.

See Judge vs. Spencer 15 Utah 242.

Nevada Bank vs. Sedgwick 104 U. S. 111.

But, if in the opinion of this Court the lower court did err, in holding that the value of the California and Idaho real estate was not deducted from the value of the shares, that error would not give this Court jurisdiction. For in so holding it was simply construing the constitution and statutes of its own State, and not deciding against a right claimed under the Constitution or laws of the United States.

We therefore respectfully submit that the writ of error should be dismissed or that the judgment of the Supreme Court of Utah be affirmed.

GEORGE HALVERSON,
Attorney for Defendant in Error.

JAMES N. KIMBALL,
Of Counsel for Defendant in Error.

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Supreme Court of the United States.

No. 270.—October Term, 1900.

The Commercial National Bank of Ogden, Plaintiff in Error, *vs.* Alma D. Chambers, as Treasurer of Weber County, Utah.	In error to the Supreme Court of the State of Utah.

[May 27, 1901.]

The plaintiff in error is a national banking association, doing business at Ogden City, Weber County, Utah. The action below was brought by the bank to enjoin the collection of the alleged illegal portion of certain taxes levied against its shareholders for the year 1898.

Certain provisions of the constitution and laws of Utah which are claimed to be pertinent to the controversy are excerpted in the margin.*

*Provisions of the constitution of Utah relied on by plaintiff in error (Rev. Stat. Utah, 1898, p. 61):

"Article XIII, Sec. 2. [What property taxable. Definitions. Revenue.]—All property in the State, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word property, as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, person and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stock, has been taxed. . . ."

"Sec. 3. [Legislature to provide uniform tax. Exemptions.]—The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: *Provided*, That a deduction of debts from credits may be authorized. . . ."

Provisions of the Revised Statutes of Utah relied on by plaintiff in error (Rev. Stat. Utah, 1898, pp. 579, 581):

"2506. All taxable property must be assessed at its full cash value. . . ."

"2507. Bank Stock. Verified Statement.—The stockholders in every bank or banking association organized under the authority of this State or of the United States must be assessed and taxed on the value of their shares of stock therein in the county, town, city or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. To aid the assessor in determining the value of such shares of stock, the cashier or other

The substance of the complaint was that although the assessor in valuing the shares of stock of the bank deducted the proportionate amount of the assessed value of the real estate of complainant situated in the State of Utah, he neglected and refused to deduct the value of real estate owned by the bank situated without such State, and also refused to allow to cer-

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accounting officer of every such bank must furnish a verified statement to the assessor, showing the amount and number of shares of the capital stock of each bank, the amount of its surplus or reserve fund or undivided profits, amount of investments in real estate, which real estate must be assessed to said bank and taxed as other real estate, and the names and places of residence of its stockholders, together with the number of shares held by each.

"2508, ID. DEDUCTIONS.—In the assessment of the shares of stock mentioned in the next preceding section each stockholder must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this State, and the assessment and taxation must not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State.

"2509, ID.—In making such assessment there must also be deducted from the value of such shares such sum as is in the same proportion to such value as the assessed value of the real estate of such bank or banking association in which such shares are held bears to the whole amount of the capital stock, surplus, reserve and undivided profits of such bank or banking association.

* * * * * *

"2518. WHAT DEBTS DEDUCTIBLE FROM CREDITS.—In making up the amount of credits which any person is required to list he will be entitled to deduct from the gross amount of such credits the amount of all *bona fide* debts owing by him, but no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, must be considered a debt within the intent of this section; and no person is entitled to a deduction on account of an obligation of any kind given to an insurance company for the premium of insurance, nor on account of any unpaid subscription to any institution or society, nor on account of a subscription to or instalment payable on, the capital stock of any company or corporation; and no liability of any person or persons, company or corporation, as surety for another must be deducted; and no other liability of any person or persons, company or corporation, on any bond or undertaking must be deducted; and no deduction must be made in any case unless the party claiming such deduction discloses to the assessor, under oath, the name or names of the persons to whom such party is indebted, and the amount of such indebtedness to each, and also that such indebtedness is not barred by the statute of limitations, or, in case such indebtedness is so barred, acknowledges such indebtedness in writing, duly subscribed. No debt is to be deducted unless the statement shows the amount of such debt, as stated under oath in the aggregate. Whenever one member of a firm or one of the proper officers of a corporation has made a statement showing the property of the firm or corporation, another member of the firm or another officer need not include such property in the statement made by him; but this statement must show the name of the person or officer who made the statement in which such property is included. The fact that such statement is not required, or that a person has not made such statement under oath or otherwise, does not relieve the property from taxation."

tain non-resident stockholders deductions from the valuations of their shares of stock to the amount of their *bona fide* debts, though allowing deductions of that kind in favor of resident shareholders. Having tendered to the defendant what it claimed to be the lawful amount of the tax due from it, the bank brought this action to enjoin any attempt to collect the full amount of the tax as laid, and to compel acceptance of the sum which had been tendered. The trial court decided in favor of the bank. On appeal, however, the Supreme Court of the State held that the bank was not entitled to the relief prayed, and reversed the judgment in its favor with costs. Error was prosecuted to the judgment of reversal, and the cause is now in this court for review. (21 Utah, ——.)

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

It is urged that "by the action of the taxing officer and the Supreme Court of Utah the shareholders of the Commercial National Bank of Ogden were treated contrary to the provisions of section 5219 of the Revised Statutes of the United States; and, further, that they were denied the equal protection of the laws." Subsidiarily, it is contended first, that the assessor erroneously refused to deduct the *bona fide* debts of non-resident shareholders from the value of their shares of stock, contrary to the provisions of the laws of Utah and the requirements of said section 5219 of the Revised Statutes of the United States (excerpted in the margin *), and, second, that the bank was entitled to a deduction from the assessed valuation of the stock, not only of the value of its real estate situated in Utah, but the value of real estate situated outside of the limits of the State.

We will first consider the contention respecting the failure to deduct *bona fide* debts from the value of the stock of non-resident shareholders. The

*Section 5219, Revised Statutes of the United States:

"SEC. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Supreme Court of Utah, referring to the provisions of the constitution of Utah noted in the margin of the statement of facts preceding this opinion, held that as the constitution of the State distinguished between stock and credits and authorized only a deduction of debts from credits, shares of stock were not credits, and both resident and non-resident shareholders were not entitled to deduct *bona fide* indebtedness from the value of their shares of stock. This construction of the statute is binding on this court. (*First National Bank of Garnett* v. *Ayers*, 160 U. S. 660, 664; *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440, 444.) The claim of the benefit of the provisions of section 5219 of the Revised Statutes of the United States is unavailing, for the reason that there was neither averment nor proof of facts taking the case out of the operation of recent decisions of this court. Those decisions held that the term "moneyed capital," as employed in section 5219 of the Revised Statutes, forbidding greater taxation of shareholders of national banks than is imposed on other moneyed capital, does not include capital which does not come into competition with the business of national banks, and that it must be satisfactorarily made to appear by the proof that the moneyed capital claimed to be given an unjust advantage is of the character just stated. (*First National Bank of Wellington* v. *Chapman*, 173 U. S. 205, 219, and cases cited.)

There is obviously no merit in the further contention that reversible error was committed because the refusal to deduct from the value of the shares of stock of the bank the assessed value of real estate owned by the bank, situate in other States than Utah. There was no proof that such a deduction was authorized by the laws of Utah in valuing shares of stock of other than national banking associations. On the contrary, the Supreme Court of Utah, from an examination of the several constitutional and statutory provisions respecting the subject of taxation in Utah, concluded that the only deductions which were authorized in the assessment of the shares of stock of national banks or other corporations organized and doing business in the State, were deductions from the value of the shares of the value of real estate situate in Utah. Manifestly, the purpose was to prevent double taxation by the State, a tax on the real estate as such and a further tax thereon by a tax on the stock to the extent that such real estate entered into the value of the stock. As the national banking law, however, permits the taxation of shares of stock of a national bank in the State where the bank is domiciled, the State of domicil is of course entitled to collect taxes upon the full value of such shares of stock. While real estate of a bank situated outside of the State of domicil is taxed in the State of its situs, yet the value of such real estate necessarily enters into and is considered in estimating the value of the shares of stock, and to deduct the value of the real estate would, to the

extent of such deduction, reduce the real value of the shares, without a compensatory equivalent. These views and those expressed by the Supreme Court of Utah accord with the doctrine enunciated in *Dwight* v. *Boston*, (12 Allen, 316, 332,) and *American Coal Co.* v. *County Commissioners*, (59 Maryland, 185, 193.) In the latter case the principle was thus expressed (p. 194):

"The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate, or other property beyond the jurisdiction of this State, the latter having control over the shares and their true value, the peculiar nature and value of the investment of the capital stock of the corporation, beyond the limits of the State, can form no proper subject for specific deduction or abatement from the true value of the shares of stock, when presented to be assessed for purposes of taxation. It is exclusively with the shares of stock, and their true value, as representing the entire corporate assets, that the tax commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to the real estate of the company situate within this State."

As the shares of stock were taxed as other similar property in Utah and no discrimination was occasioned, we can perceive no ground for concluding that the refusal to deduct the value of the real estate in question constituted either a violation of section 5219, Revised Statutes, or a denial of the equal protection of the laws.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.